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IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

BROTHERHOOD OF RAILROAD TRAINMEN,
Appellant,

vs.

CHARLES V. SMITH, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD and THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation, *Appellees.*

Appeal from United States District Court, Southern District of Ohio, Western Division

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APPENDIX

Attorney for Appellant:

J. A. CULBERTSON
905 First National Bank Building
Cincinnati 2, Ohio

Attorneys for Appellee:

PAXTON & SEASONGOOD
1616 Union Central Building
Cincinnati, Ohio

CHARLES A. HASTINGS
ELLIOTT, SHUTTLEWORTH & INGERSOLL
1120 Merchants National Bank Bldg.
Cedar Rapids, Iowa

PHILIP J. SCHNEIDER
WAITE, SCHINDEL & BAYLESS
1318 Union Central Building
Cincinnati 2, Ohio

S. R. PRINCE
301 B. & O. Bldg.
Baltimore, Maryland

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MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN FOR PERMISSION TO INTERVENE AS A PARTY-DEFENDANT

Comes now the BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary unincorporated railroad labor organization, having its principal office and place of business in Cleveland, Ohio, and moves the court for permission to intervene herein as a party-defendant, and represents to the court that:

1. It is a necessary and proper party to be named defendant herein;
2. It holds a union shop agreement with the defendant, The Baltimore & Ohio Railroad Company;
3. The said union shop agreement was in full force and effect at the time the controversy arose out of which this litigation grows;
4. That pertinent to the controversy here and the questions to be determined is the interpretation and applicability of the terms of said union shop agreement.

WHEREFORE, movant, Brotherhood of Railroad Trainmen, prays for permission of the court to intervene as a party-defendant herein, with the right to plead.

J. A. CULBERTSON
905 First National Bank Building
Cincinnati, Ohio
Attorney for Brotherhood of Railroad Trainmen.

CERTIFICATE

J. A. CULBERTSON states that he is counsel for the movant, Brotherhood of Railroad Trainmen, and that he has served a copy of the foregoing motion on counsel for the party-plaintiff, namely, upon Paxton & Seasongood,

1616 Union Central Building, Cincinnati, Ohio, and Elliott, Shuttleworth & Ingersoll, 1120 Merchants National Bank Building, Cedar Rapids, Iowa, by handing a copy of the foregoing motion to each of said firms, on this 10th day of July, 1956.

J. A. CULBERTSON
Attorney for Brotherhood of
Railroad Trainmen

In the

UNITED STATES DISTRICT COURT

Southern District of Ohio, Western Division

Civil No. 3804

CHARLES V. SMITH, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD,

Plaintiffs,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation,

Defendant.

TRANSCRIPT OF DOCKET ENTRIES

FILINGS-PROCEEDINGS

Date

June 13, 1956 Complaint filed.

June 13, 1956 Motion for Temporary restraining order filed.

June 13, 1956 Temporary restraining order issued. Hearing set June 22 – 10:00 A. M.

June 13, 1956 Bond of $1000.00 filed.

June 13, 1956 Summons issued together with copy of Complaint and copy of Temporary Restraining Order.

June 20, 1956 Order extending time for hearing to June 29, 1956.

June 21, 1956 Summons returned executed. Marshal Fee $2.20.

June 29, 1956 Order extending time for hearing to July 11, 1956 and extending Temporary Restraining Order.

July 10, 1956 Motion of Brotherhood of R. R. Trainmen for Permission to Intervene as Party Defendant filed.

July 11, 1956 Answer of Defendant, B. & O. R. R. Co., filed.

July 11, 1956 Hearing on Motion for Temporary Restraining Order — Arguments of counsel — Cause continued to September 5, 1956.

July 11, 1956 Entry Sustaining Motion of the Brotherhood of Railroad Trainmen for permission to Intervene as Party-Defendant, and to Plead Herein.

July 11, 1956 Answer of Brotherhood of Railroad Trainmen filed.

July 11, 1956 Order continuing Temporary Restraining Order until September 5, 1956.

July 11, 1956 Order allowing Leave to File Amended and Substituted Complaint.

July 11, 1956 Amended and Substituted Complaint filed.

July 11, 1956 Acknowledgement of Service of Amended and Substituted Complaint filed.

August 24, 1956 Return of Defendant to Temporary Restraining Order — filed.

August 24, 1956 Answer of Defendant B & O Railroad Company to Plaintiff's Amended Complaint.

August 28, 1956 Motion of Brotherhood of R. R. Trainmen to Dismiss — filed.

September 5, 1956 Memo in support of plaintiff's application for preliminary injunction filed.

September 5, 1956 Motion of Brotherhood of Railroad Trainmen to Dismiss, argued. (Overruled).

September 5, 1956 Order Overruling Motion of Brotherhood of R. R. Trainmen to Dismiss.

September 5, 1956 Trial to Court begun — Stipulation and Exhibits tendered — cause continued to September 12, 1956 at 11:00 o'clock A. M.

September 5, 1956 Plaintiff Praecipe for subpoena in blank and subpoena issued.

September 10, 1956 Transcript of Proceedings and stipulation — filed.

September 11, 1956 Answer of the Brotherhood of Railroad Trainmen to the Amended and Substituted Complaint.

September 11, 1956 Exceptions to Stipulations filed.

September 12, 1956 Trial to Court continued and concluded — Testimony on behalf of Plaintiff concluded — Motion of Brotherhood of Railroad Trainmen to Dismiss Complaint.

September 20, 1956 Transcript of Proceedings September 12, 1956, filed.

September 24, 1956 Memo of Plaintiff on Motion to Dismiss filed.

October 3, 1956 Findings of Fact and Conclusions of Law filed.

October 3, 1956 Judgment — IT IS ORDERED, ADJUDGED AND DECREED:

1. That the defendants, the Baltimore & Ohio Railroad Company and the Brotherhood of Railroad Trainmen, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them, be and they are hereby restrained and enjoined from terminating or taking any action to require the termination of the employment status and seniority of the plaintiff, Charles V. Smith and all other employees similarly situated as conductors because of their failure to comply with the Union Shop Agreement between the Defendants dated

September 20, 1951, and are further restrained and enjoined from continuing to deny the employment status and seniority as conductors of any employees similarly situated to said plaintiff Charles V. Smith whose employment status and seniority as conductors has been heretofore terminated because of noncompliance with said Union Shop Agreement.

2. Nothing herein shall be construed as in any manner enjoining the defendants, The Baltimore & Ohio Railroad Company and the Brotherhood of Railroad Trainmen, from terminating the employment and seniority as trainmen of the plaintiff Smith and other employees similarly situated or as enjoining the defendants from in any way taking any action to compel or require the termination of their employment and seniority as trainmen.

3. The costs of this action are taxed to the defendants.

October 30, 1956 The Brotherhood of Railroad Trainmen excepts. Defendant, Brotherhood of Railroad Trainmen's Notice of Appeal filed. Certified Copies mailed all interested attorneys.

December 6, 1956 Record certified to the Court of Appeals for the Sixth Judicial Circuit.

December 7, 1956 Bond of $250.00 on Appeal filed. (Check from J. C. Culbertson)

ENTRY SUSTAINING MOTION OF THE BROTHERHOOD OF RAILROAD TRAINMEN FOR PERMISSION TO INTERVENE AS PARTY-DEFENDANT, AND TO PLEAD HEREIN

This matter coming on to be heard upon the motion of the Brotherhood of Railroad Trainmen, a voluntary unincorporated railroad labor organization, for permission

to intervene herein as a party-defendant and the right to plead, was submitted to the court on said motion, on consideration whereof the court finds the motion well taken and sustains the same.

It is, therefore, in accordance with the said holding hereby ORDERED AND ADJUDGED BY THE COURT that the said Brotherhood of Railroad Trainmen should be and it hereby is, ordered to be made an intervening party-defendant herein, with right to plead.

The said intervening defendant having in open court tendered its answer to the complaint of the plaintiffs, it is FURTHER ORDERED that the said answer be entered of record herein.

DRUFFEL, Judge.

J. A. CULBERTSON
Attorney for B. R. T.

AMENDED AND SUBSTITUTED COMPLAINT

1. Plaintiff, Charles V. Smith, is a resident of Hamilton County, Ohio, and is a citizen of the State of Ohio and the Order of Railway Conductors and Brakemen General Committee of Adjustment for the Baltimore and Ohio Railroad, hereinafter sometimes referred to as plaintiff organization, is a voluntary, unincorporated association with its principal place of business located in Cincinnati, Hamilton County, Ohio.

2. Defendant, the Baltimore and Ohio Railroad Company is a corporate common carrier within the provisions of the Railway Labor Act, as amended, 45 U.S.C.A., Sec. 151 *et seq.*, and is a corporation duly authorized and existing under and by virtue of the laws of the State of Maryland and is authorized to do business in the State of Ohio.

3. This action arises under the laws of the United States of America regulating commerce and more particularly under the Railway Labor Act, as amended, 45 U.S.C.A., Sec. 151 *et seq*. Jurisdiction is also founded upon diversity of citizenship as between the plaintiff and the defendant, as hereinbefore alleged, and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

4. Plaintiffs bring this action on behalf of themselves and for all other employees of the defendant belonging to the class and craft of conductors represented by the Order of Railway Conductors and Brakemen similarly situated. The reason for not joining all of said employees similarly situated as plaintiffs is that they are so numerous as to make it impracticable to bring them all before the court and the plaintiffs do adequately represent such class of employees.

5. Plaintiff Smith is and has been since 1929 an employee of the defendant railroad and is presently employed as a regularly assigned conductor by said defendant and was promoted and holds seniority as a conductor from and after August 6, 1944.

6. The Order of Railway Conductors and Brakemen is a labor organization national in scope organized in accordance with the provisions of said Railway Labor Act. Said organization has been exclusive bargaining representative of the class and craft of conductors on the defendant's railroad for a period of more than 60 years and is presently certified as the bargaining representative of the class and craft of conductors on said railroad, pursuant to Section 2 of the Railway Labor Act, 45 U.S.C., Sec. 152, and is acting as representative of said class and craft of conductors on the properties of said defendant railroad pursuant to a collective bargaining agreement effective September 1, 1927, as amended, providing rates of pay, rules and working conditions for the said class and craft of conductors.

7. Plaintiff Smith is employed by the defendant as a regularly assigned conductor, is a member in good standing of said Order of Railway Conductors and Brakemen, and is an employee of the defendant belonging to the class and craft of conductors represented by the Order of Railway Conductors and Brakemen, and as a member of such craft and class is employed and works under said collective bargaining agreement.

8. In violation of the Railway Labor Act, the defendant railroad has notified plaintiff Smith that he will be discharged from its employ and that his employment and seniority as a conductor will be terminated June 14, 1956, upon the demand of the Brotherhood of Railroad Trainmen, solely because of an alleged failure by plaintiff Smith to comply with the terms of a union shop agreement between the defendant railroad and the Brotherhood of Railroad Trainmen, a labor organization representing the class and craft of trainmen and yardmen, that is, brakemen, porters, switch tenders, yardmasters, car retarder operators and other yardmen employed by the defendant railroad. Said Brotherhood of Railroad Trainmen does not represent the class and craft of conductors on defendant's railroad and said union shop agreement does not cover and does not purport to cover the class and craft of trainmen and yardmen represented by said Brotherhood. A copy of said union shop agreement marked Exhibit "A" is attached hereto and by this reference is made a part hereof.

9. The proposed discharge of the plaintiff Smith, a member of the class and craft of conductors, at the instance and request of the Brotherhood of Railroad Trainmen, representing a class or craft of employees other than conductors, constitutes a violation of the Railway Labor Act and is illegal as to both the Plaintiff Smith and the plaintiff

organization and is an attempt to interfere with, influence or coerce employees in their choice of representatives, and plaintiffs further allege that if said union shop agreement between the defendant and the Brotherhood of Railroad Trainmen requires or is interpreted by the defendant to require the discharge of an employee belonging to a class or craft other than that represented by the Brotherhood of Railroad Trainmen, such agreement is to such extent invalid and void under the provisions of the Railway Labor Act.

10. The proposed discharge of the plaintiff Smith, a regularly assigned conductor and a member of the class and craft of conductors, on the ground that he is not a member of the Brotherhood of Railroad Trainmen is in utter disregard of the exclusive right of the plaintiff Order of Railway Conductors and Brakemen to represent the class and craft of conductors employed on the defendant railroad and is a violation of the Railway Labor Act, and constitutes an illegal deprivation of the right of the Order of Railway Conductors and Brakemen to legislate and bargain collectively for the class and craft of conductors for which it is the certified exclusive bargaining representatives.

11. The proposed discharge of the plaintiff Smith will effectively destroy the seniority and other rights acquired by said plaintiff as a conductor, under the provisions of the collective bargaining agreement between the plaintiff organization and the defendant for the class and craft of conductors, which rights said defendant is without legal power unilaterally to destroy and such action by the defendant constitutes a violation of the Railway Labor Act as hereinbefore stated.

12. The defendant, The Baltimore and Ohio Railroad Company, has terminated and is continuing to deny the employment status and seniority of other employees of

said defendant belonging to the class and craft of conductors represented by the Plaintiff, Order of Railway Conductors and Brakemen, solely because of the alleged failure of such employees to comply with the terms of the union shop agreement referred to in paragraph 8. The continued denial of the employment status and seniority as conductors of such employees is illegal and is in violation of the rights of said employees and of the rights of the plaintiff, Order of Railway Conductors and Brakemen, for the reasons set forth in paragraphs 8, 9, 10 and 11 of this Amended and Substituted Complaint.

13. The defendant, The Baltimore and Ohio Railroad Company, has threatened and will, unless restrained by this Court, terminate the employment status and seniority as conductors of other employees similarly situated for the same reasons. The termination of the employment status and seniority as conductors of such other employees will be illegal and in violation of the rights of said employees and of the plaintiff, Order of Railway Conductors and Brakemen, for the reasons set forth in paragraphs 8, 9, 10 and 11 of this Amended and Substituted Complaint.

14. Plaintiffs have no administrative remedy available to them under the Railway Labor Act, and plaintiffs have no adequate remedy at law.

15. Unless restrained by this Court, said proposed discharge or discharges will become or remain effective and each of the plaintiffs will suffer immediate and irreparable injury, loss and damage to their respective property and rights. Such irreparable injury, loss and damage will be sustained by plaintiffs and each of them, before a notice of hearing for a preliminary injunction could be served upon the defendant and a hearing held thereon, and it is accordingly necessary that, pending the service of such notice and the holding of such a hearing, a temporary restraining

order be issued restraining the defendant from putting into effect the proposed discharge of the plaintiff Smith and all other employees similarly situated in such manner as to terminate his or their employment and seniority as a conductor or in any manner violating the rights of representation of the plaintiff Order of Railway Conductors and Brakemen for the class and craft of conductors under the Railway Labor Act. No injury or damage could be sustained by the defendant if such a temporary restraining order is issued, but the plaintiffs offer to give security in such sum as the Court may deem proper for the payment of any damage, including costs, that the defendant may incur if it be found that such temporary restraining order was improperly issued.

WHEREFORE, plaintiffs pray for the following relief:

1. That the defendant be temporarily restrained from placing in effect the proposed discharge of the plaintiff Charles V. Smith or any other employees similarly situated in such manner as to terminate his or their employment and seniority as a conductor on June 14, 1956 or any other time.

2. That the defendant be temporarily restrained from in any manner violating the rights of representation of the plaintiff Order of Railway Conductors and Brakemen General Committee of Adjustment for the Baltimore and Ohio Railroad for the class and craft of conductors by terminating or continuing to deny the employment status and seniority as conductors because of their alleged failure to comply with the union shop agreement between the defendant and the Brotherhood of Railroad Trainmen.

3. That a preliminary injunction be granted after due notice and hearing restraining the defendant from in any manner making effective the provisions of the union shop agreement between the defendant and the Brotherhood of

Railroad Trainmen to terminate or to continue to deny the employment status and seniority as conductors of employees belonging to the class and craft of conductors represented by the plaintiff Order of Railway Conductors and Brakemen General Committee of Adjustment for the Baltimore and Ohio Railroad.

4. That a preliminary injunction, after due notice and hearing, be further granted restraining the defendant from discharging the plaintiff Charles V. Smith or all other employees similarly situated in such manner as to terminate his or their employment and seniority as a conductor by reason of their alleged failure to comply with the provisions of the union shop agreement between the defendant and the Brotherhood of Railroad Trainmen.

5. That upon final hearing such preliminary injunction be made permanent.

6. Any such other and further relief as the Court may seem just and proper.

JOSEPH A. SEGAL
DAVID W. GOLDMAN
V. CRAVEN SHUTTLEWORTH
CHARLES A. HASTINGS
Attorneys for Plaintiffs

Of Counsel:
PAXTON & SEASONGOOD
1618 Union Central Building
Cincinnati, Ohio
ELLIOTT, SHUTTLEWORTH & INGERSOLL
1120 Merchants National Bank Bldg.
Cedar Rapids, Iowa

STATE OF OHIO)
) SS.
COUNTY OF HAMILTON)

CHARLES V. SMITH, being first duly sworn, on oath deposes and states that he is one of the plaintiffs above named; that he has read the above and foregoing Amended and Substituted Complaint and that the allegations thereof are true.

CHARLES V. SMITH

Subscribed and sworn to before me this 10th day of July, A.D. 1956.

DAVID W. GOLDMAN
Notary Public, State of Ohio
My Commission Expires Oct. 25, 1957

(SEAL)

STATE OF OHIO)
) SS.
COUNTY OF HAMILTON)

GEORGE H. HARRIS, being first duly sworn, on oath deposes and states that he is General Chairman of the Order of Railway Conductors and Brakemen General Committee of Adjustment for the Baltimore & Ohio Railroad, one of the plaintiffs above named; that he has read the above and foregoing Amended and Substituted Complaint and that the allegations thereof are true.

G. H. HARRIS

Subscribed and sworn to before me this 10th day of July, A.D. 1956.

DAVID W. GOLDMAN
Notary Public, State of Ohio
My Commission Expires Oct. 25, 1957.

(SEAL)

EXHIBIT "A"
(Rec'd Oct. 18, 1951.)

This Agreement made this 20th day of September, 1951, by and between The Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, The Staten Island Rapid Transit Railway Company, each hereinafter referred to as "Carriers", and the employees to the extent shown on Exhibit A, attached hereto and hereby made a part hereof, represented by the Brotherhood of Railroad Trainmen, hereinafter referred to as the "Brotherhood".

WITNESSETH:

Sec. 1. In accordance with and subject to the terms and conditions hereinafter set forth, all employees of the Carriers now or hereafter subject to the rules and working conditions agreements, as shown on Exhibit A, between the parties hereto shall, as a condition of their continued employment subject to such agreements, become members of the Brotherhood within sixty (60) calendar days of the date they first perform compensated service as such employees after the effective date of this agreement, and thereafter shall maintain membership in the Brotherhood.

Sec. 2. The requirements of membership provided for in Section 1 of this agreement shall be satisfied if any employee shall hold or acquire membership in any one of the labor organizations, other than the Brotherhood, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service, that is, in any of the services or capacities covered in Section 3, First, (h), of the Railway Labor Act, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board. Provided, however, that nothing

contained in this agreement shall prevent any employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of the services above specified.

Sec. 3(a). Employees who retain seniority under the rules and working conditions agreements set forth in Exhibit A and who are regularly assigned or transferred to full time employment not covered by such agreements or furloughed on account of force reduction or lack of employment, or who are absent because of sickness, physical disability, or granted leave of absence for any reason, will not be required to maintain membership as provided in Section 1 of this agreement so long as they remain in such status, but they may do so at their option. Should such employees return to service covered by the said rules and working conditions agreement they shall, as a condition of their continued employment subject to such agreements, be required within thirty (30) days from date of their return to such service to comply with the provisions of Sections 1 or 2 of this agreement.

(b). The seniority status and rights of employees on leave of absence for military service shall not be terminated pursuant to any of the provisions of this agreement. However, such employees upon resumption of employment, to the extent permitted by applicable agreements or laws, shall be governed by the provisions of Sections 1 or 2 of this agreement.

Sec. 4. Nothing in this agreement shall require an employee to become or to remain a member of the Brotherhood if such membership is not available to such employee upon the same terms and conditions as are generally applicable to other members, or if the membership of such employee is denied or terminated for any reason other than the failure of the employee to tender the periodic dues,

initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. For purposes of this Section, dues, fees, and assessments, shall be deemed to be "uniformly required" if they are required of other employees in the same status at the same time.

Sec. 5(a). Each and every employee covered by this agreement shall be considered by the Carriers to have complied with the requirements of this agreement, or as having been denied membership in the Brotherhood, unless the Carrier is advised to the contrary in writing in the manner hereinafter provided for. The Brotherhood shall at all times be responsible for initiating any action or proceedings to enforce the terms of this agreement and the Carrier shall have no responsibility with respect thereto.

(b). The Brotherhood will notify the employing Carrier in writing of any employee who by reason of failure to comply with the terms of this agreement is not entitled to continue in employment. Upon receipt of such notice, the Carrier will, as promptly as possible, but within ten (10) calendar days of such receipt, so notify the employee concerned in writing by registered mail, return receipt requested, or by personal delivery evidenced by receipt. Copy of such notice shall be given the Brotherhood. Any employee so notified who disputes the fact that he has failed to comply with the terms of this agreement, shall, within a period of ten (10) calendar days from the date of such notice, request the Carrier in writing to accord him a hearing. Upon receipt of such request, the Carrier shall set a date for hearing which shall be held within ten (10) calendar days of the date of receipt of request therefor. Notice of the date set for hearing shall be promptly given the employee in writing by registered mail, return receipt requested, or by personal delivery evidenced by receipt.

Copy of notice of such hearing shall be given to the Brotherhood, and a representative of the Brotherhood shall attend and participate in the hearing. The receipt by the Carrier of a request for a hearing shall operate to stay action on the termination of employment until the hearing is held and the decision of the Carrier is rendered. In the event the employee concerned fails to request a hearing as provided herein, the Carrier shall proceed to terminate his employment and seniority in his class or craft not later than thirty (30) calendar days from receipt of the above described notice from the Brotherhood, unless the Carrier and the Brotherhood agree otherwise in writing.

(c). The Carrier shall determine on the basis of the evidence produced at the hearing whether or not the employee has complied with the terms of this agreement, and shall render a decision accordingly. Such decision shall be rendered within ten calendar days of the hearing date and the employee and the Brotherhood shall be promptly advised thereof. If the decision is that the employee has not complied with the terms of this agreement, his employment and seniority in his class or craft shall be terminated within ten (10) calendar days of the date of said decision, unless the Carrier and the Brotherhood agree otherwise in writing. If the decision of the Carrier is not satisfactory to the employee or to the Brotherhood it may be appealed directly to the highest officer of the Carrier designated to handle such appeals. Such appeal shall be taken within ten (10) calendar days of the date of the decision appealed from, and if taken, shall operate to stay action on the termination of employment, until the decision on appeal is rendered. The Carrier shall promptly notify the other party in writing of any such appeal. The decision on such appeal shall be rendered within ten (10) calendar days of the date the

appeal is taken, and the employee and the Brotherhood shall be promptly advised thereof. If the decision on such appeal is that the employee has not complied with the terms of this agreement, his employment and seniority in his class or craft shall be terminated within ten (10) calendar days of the date of said decision, unless the Carrier and the Brotherhood agree otherwise in writing. Such decision on appeal shall be final and binding unless proceedings are instituted by the Brotherhood within fifteen (15) days from the date of such decision for further handling of the case under Section 8 of this Agreement. The institution of such proceedings shall operate to stay action on termination of employment until the dispute is disposed of under the provisions of Section 8.

(d). Time limits specified in this Section may be extended in individual cases by written agreement between the Carrier and the Brotherhood.

(e). Provisions of discipline rules contained in rules and working conditions agreement between the Carriers and the Brotherhood will not apply to cases arising under this agreement.

(f). The General Chairman of the Brotherhood shall notify the Carrier in writing of the title (s) and address (es) of its officers or representatives who are authorized to serve and receive the notices described in this Section. The Carrier shall notify the General Chairman of the Brotherhood of the title (s) and address (es) of its officers or representatives who are authorized to receive the notices described in this Section.

Sec. 6. Other provisions of this agreement to the contrary notwithstanding, the Carriers shall not be required to terminate the employment of any employee until such time as the services of a qualified replacement are available to replace such employee.

Exhibit "A"

Sec. 7. No part of this Agreement shall be used in any manner whatsoever as a basis for a grievance or time claim by or on behalf of any employee; and no part of the rules and working conditions agreement shall be used as a basis for a grievance or time claim by or on behalf of any employee predicated upon an alleged violation, misapplication or non-compliance with any part of this Agreement relating to Union Shop.

Sec. 8. Any and all disputes between the Carriers and the Brotherhood arising out of or in any way connected with the interpretation or application of this agreement, or the failure to comply with the terms of this agreement, shall be referred jointly, or by either party, for decision to a committee consisting of one representative of the Carrier involved and one representative of the Brotherhood. In the event such two members of the committee agree upon a decision in such dispute, its decision shall be final and binding. In the event such committee is unable to reach a decision with respect to any such dispute, a neutral referee shall be selected by the members of the committee, to sit with the committee and act as a member thereof. If such two members of the committee are unable to agree upon the selection of such neutral referee, either member of the committee may request the National Mediation Board to appoint such neutral referee. In the event of the formation of a committee with a neutral referee, as above provided, the decision of a majority of all members of the committee shall be final and binding upon the parties.

The procedure provided for in this Section 8 shall be the sole and exclusive method for determining disputes under this agreement.

Sec. 9. This agreement shall become effective on October 1, 1951, and is in full and final settlement of the re-

Exhibit "A"

quests served upon the Carriers by the Brotherhood on or about February 8, 1951. It shall be construed as a separate agreement by and on behalf of each Carrier party hereto and those employees represented by the Brotherhood on each of said Carriers as shown on Exhibit A. This agreement shall remain in effect until modified or changed in accordance with the provisions of the Railway Labor Act, as amended.

SIGNED AT BALTIMORE, MD., this 20th day of September, 1951.

FOR THE EMPLOYEES REPRESENTED BY
THE BROTHERHOOD OF
RAILROAD TRAINMEN:
By: /signed/ C. L. NICHOLS
General Chairman

Approved:
By: /signed/ J. R. LAVIN
Vice President

FOR THE PARTICIPATING CARRIERS:
The Baltimore and Ohio Railroad Company
The Baltimore and Ohio Chicago Terminal
Railroad Company
The Staten Island Rapid Transit Railway
Company

By: /signed/ R. L. HARVEY
Manager Lbr. Relations.

Exhibit "A"

ORGANIZATION

Brotherhood of Railroad Trainmen

RAILROADS	Trainmen & Yardmen (Including Switchtenders)	Yardmasters	Car Retarder Operators
The Baltimore and Ohio Railroad Company			
Baltimore and Ohio Proper (Agreement effective September 1, 1927, reprinted March 1, 1943)	X		X
Buffalo, Rochester & Pittsburgh Territory (Agreement effective January 1, 1923)	X		
Buffalo & Susquehanna District (Agreement effective May 1, 1929)	X		
Curtis Bay Railroad (Agreement effective January 1, 1944)	X		
The Baltimore and Ohio Chicago Terminal Railroad Company (Agreement effective November 5, 1933)	X		
The Staten Island Rapid Transit Railway Company (Agreement effective August 4, 1947)	X	X	

Exhibit "A"

Baltimore 1, Md.,
September 20, 1951

Mr. C. L. Nichols, General Chairman
Brotherhood of Railroad Trainmen
11705 Detroit Avenue
Lakewood 7, Ohio.

Dear Sir:

In connection with Union Shop Agreement executed this date between The Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, the Staten Island Rapid Transit Railway Company and the Brotherhood of Railroad Trainmen, it is understood and agreed as follows:

(a) With respect to Section 1, it is understood that where the situation is such that an employee after entering service does not have the opportunity to perform 30 days of compensated service within the 60 calendar day period provided for in Section 1, he shall have additional time in which to comply with Sections 1 or 2 until such time as he has acquired 30 days of compensated service.

(b) With respect to Section 3(a), the provisions thereof relating to the granting of leaves of absence for any reason shall not apply as to any employee who has complied with the terms of the Union Shop Agreement until such time as leave of absence exceeds 30 consecutive calendar days.

(c) With respect to Section 9, it is agreed that if and when the Brotherhood desires to secure deductions from wages of periodic dues, initiation fees and assessments, the matter will be handled in negotiation with-

Exhibit "A"

out respect to any of the provisions of this Agreement and it will not be necessary for the Brotherhood to serve a formal notice.

If the foregoing is agreeable will you please indicate your acceptance thereof by execution of this letter in space provided therefor below.

Yours truly,
/signed/ R. L. HARVEY.

MR. J. R. LAVIN, Vice President
Brotherhood of Railroad Trainmen
159-18 89th Avenue
Jamaica 2, New York.

ACCEPTED:
/signed/ C. L. NICHOLS
General Chairman

ANSWER OF DEFENDANT THE BALTIMORE AND OHIO RAILROAD COMPANY TO PLAINTIFFS' AMENDED COMPLAINT

Defendant, THE BALTIMORE AND OHIO RAILROAD COMPANY, for answer to the complaint filed against it, respectfully represents unto the Court as follows:

FIRST DEFENSE

1. That this Honorable Court, by its order dated July 11, 1956, granted the Brotherhood of Railroad Trainmen, an unincorporated association, leave to intervene as a party defendant herein.

2. That subsequent to the above-mentioned order of this Honorable Court, the plaintiffs filed their amended and substituted complaint in this cause; that said amended and substituted complaint does not designate the Brotherhood of Railroad Trainmen as a party defendant.

WHEREFORE your defendant prays that an appropriate order be entered by this Honorable Court compelling plaintiffs, in accordance with Rule 10-A of the Federal Rules of Federal Procedure, to designate in the title of the action the Brotherhood of Railroad Trainmen as a party defendant.

SECOND DEFENSE

1. Defendant admits the allegations of paragraph 1 of the complaint.

2. Defendant admits the allegations of paragraph 2 of the complaint.

3. Answering paragraph 3 of the complaint defendant admits that the action arises under the laws of the United States, more particularly under the Railway Labor Act, 45 U.S.C.A. 151, *et seq.*, and that a diversity of citizenship exists between plaintiff organization and defendant in a matter in controversy exceeding the value of Three Thousand Dollars ($3,000.00). For further answer defendant avers that the individual rights and claims of plaintiff Smith and all other employees of defendant similarly situated, depending as they do upon a collective bargaining agreement, are within the exclusive primary jurisdiction of the National Railroad Adjustment Board; but, further, that the rights claimed by the plaintiff organization are not within the jurisdiction of the National Railroad Adjustment Board.

4. Answering paragraph 4 of the complaint defendant denies that the employees similarly situated with plaintiff

Smith are so numerous as to make it impracticable to bring them all before the Court. And for further answer defendant avers that in compliance with the Temporary Restraining Order of this Honorable Court, issued July 11, 1956, defendant conducted a system-wide investigation to determine which of its employees come within the scope of said Order and that defendant's investigation disclosed that only twenty employees are similarly situated with plaintiff Smith. A list of such employees is attached hereto as Exhibit "A" hereof.

5. Answering paragraph 5 of the complaint defendant admits that plaintiff Smith possesses seniority as a conductor from August 6, 1944, but denies the allegation that he is presently employed as a conductor. And for further answer avers that plaintiff Smith during June, July, August, and September 1952 worked in employments in the class and craft of trainmen represented for collective bargaining purposes by the Brotherhood of Railroad Trainmen, except on June 6 and 8, 1952, when he worked as an emergency freight conductor.

6. Defendant admits the allegations of paragraph 6 of the complaint.

7. Defendant admits the allegations of paragraph 7 of the complaint, except defendant denies that he is presently employed as a regularly assigned conductor. And for further answer defendant avers that plaintiff Smith in April 1952 and for the remainder of 1952 was a dues-paying member of a labor organization known as the United Railroad Operating Crafts and that he ceased to be a member of the Brotherhood of Railroad Trainmen effective July 1, 1952, after failing to pay dues in said organization; and lastly avers on information and belief that plaintiff Smith became a member of the Order of Railway Conductors and Brakemen on April 1, 1956.

Answer of Defendant B. & O. Rd. Co.

8. For answer to paragraph 8 of the complaint, defendant admits that plaintiff Smith's employment status will be terminated effective June 14, 1956, on account of failure to comply with the terms of a union shop agreement between defendant and the Brotherhood of Railroad Trainmen. Defendant admits the Brotherhood of Railroad Trainmen does not represent the craft and class of conductors on defendant's railroad and that said union shop agreement does not cover and does not purport to cover the class and craft of conductors. Defendant also admits the authenticity of the union shop agreement attached as Exhibit "A" and incorporates it as a part hereof. And for further answer defendant avers that the Brotherhood of Railroad Trainmen notified the defendant on July 28, 1952, that plaintiff Smith was in violation of its union shop agreement; that plaintiff was cited for this violation by defendant on July 31, 1952; that plaintiff Smith requested a hearing of the union shop charge on August 12, 1952; that such a hearing was set for September 2, 1952, and was, at the request of plaintiff Smith, continued to and held on September 9, 1952; that the decision in the case of plaintiff Smith was rendered on January 6, 1955; when defendant notified him that his employment relationship would be terminated effective January 17, 1955; that on January 12, 1955, plaintiff Smith requested an appeal hearing, which, pursuant to notice of February 17, 1955, was duly held on February 28, 1955; and, on account of judicial restraint, no decision was rendered by defendant until June 4, 1956, when it was determined that plaintiff Smith was in violation of the said union shop agreement between defendant and the Brotherhood of Railroad Trainmen; and, accordingly, he was notified on that date that his employment relationship with defendant would be

terminated June 14, 1956. Defendant denies the conclusions of law that defendant's pending discharge of plaintiff Smith is in violation of the Railway Labor Act.

9. Defendant admits that on June 4, 1956, it made a decision on appeal in the case of plaintiff Smith under the union shop agreement between defendant and the Brotherhood of Railroad Trainmen whereby it was determined that plaintiff Smith's employment relationship with defendant would be terminated effective June 14, 1956, and that said termination would necessarily operate to deprive plaintiff Smith of the right to exercise his seniority as a conductor in the class and craft of conductors. For further answer defendant avers that the Brotherhood of Railroad Trainmen, the other contracting party to said agreement, interprets it to authorize and require the termination of the employment and seniority of persons found to have violated the union shop agreement notwithstanding that some such persons possess a seniority date and status in the class or craft of conductor, provided only that such violator worked at least as a trainman during 60 days before the date when the Brotherhood of Railroad Trainmen issued its notice of violation to defendant, and also upon said date as plaintiff Smith was working. Defendant denies that the proposed discharge of plaintiff Smith is an attempt to interfere with, influence, or coerce employees in their choice of representatives, but avers, as hereinbefore stated, that plaintiff Smith was cited for violation of the union shop agreement on July 31, 1952, and, on information and belief, that plaintiff Smith did not become a member of the Order of Railway Conductors and Brakemen until April 1, 1956.

10. Defendant denies the allegations of paragraph 10 of the complaint, except defendant admits that the termination of plaintiff Smith's seniority and status as

conductor, and the like termination of such seniority of others similarly situated which has or will occur, if unlawful, does constitute an encroachment, trespass, and infringement of the right of the plaintiff organization to exclusive representation of the craft of conductors on this property.

11. In answer to paragraph 11 of the complaint, defendant admits that the proposed termination of employment will effectively destroy the seniority and other rights of plaintiff Smith as conductor; defendant denies the allegation that its action constitutes a violation of the Railway Labor Act.

12. Defendant admits that it has, subject to the Temporary Restraining Order of this Honorable Court, terminated the employment status and seniority of the employees listed in Exhibit "A" of this Answer because of their failure to comply with the terms of the union shop agreement.

For answer to the second sentence of paragraph 12 of the complaint which applies the allegations of paragraphs 8, 9, 10, and 11 (relative to plaintiff Smith) to the other plaintiffs, the defendant incorporates its answer to said previous paragraphs.

13. In answer to paragraph 13 of the complaint defendant admits that it will, subject to the Temporary Restraining Order of this Honorable Court, terminate the employment status and seniority of the employees listed in Exhibit "A" of this Answer for the same reasons.

For answer to the second sentence of paragraph 13 of the complaint which applies the allegations of paragraphs 8, 9, 10, and 11 (relative to plaintiff Smith) to the other plaintiffs, the defendant incorporates its answer to said previous paragraphs.

14. Defendant denies the allegations of paragraph 14 of the complaint, except that it admits and avers that the plaintiff organization has no adequate remedy at law and is without any adequate administrative remedy, in as much as defendant's interest is represented on the First Division of the National Railroad Adjustment Board by the five of said Division's ten members known as "Carrier Members", and that one of the five "Labor Members" of said First Division is appointed and compensated by the Brotherhood of Railroad Trainmen, which is the real adversary party in interest in this dispute.

15. Answering the first sentence of paragraph 15 of the complaint defendant admits that the alleged injury, loss, and damage have immediate and irreparable incidence upon plaintiffs, but otherwise denies said allegations. Defendant makes no answer to the remainder of paragraph 15, same being now moot on account of the prior issuance of the restraining order herein.

WHEREFORE defendant submitting to the jurisdiction of this Court prays:

(a) That this Honorable Court order that the employees listed in Exhibit "A" herewith, if consenting thereto, be named and be joined as individual party plaintiffs, and that otherwise they be stricken from said class.

(b) That the Court determine and declare that defendant's treatment of Charles V. Smith and the others similarly situated at the behest of the Brotherhood of Railroad Trainmen, though they have been deprived of their employment status and seniority as conductors, does not violate the rights of the plaintiff organization under the Railway Labor Act nor otherwise.

(c) That the Court will take jurisdiction of said controversy and declare the rights of defendant and of the labor organizations, parties hereto, in order to do complete justice.

THIRD DEFENSE

That defendant avers as a separate and independent defense:

1. Pursuant to the Union Shop Amendment (Public Law No. 914, 81st Cong., approved January 10, 1951) to the Railway Labor Act, 45 U.S.C.A. 151 *et seq.*, 152, Eleventh, defendant entered into a union shop agreement on September 20, 1951, effective October 1, 1951, with the Brotherhood of Railroad Trainmen, made a part hereof by reference to Exhibit "A" with the complaint.

2. The Brotherhood of Railroad Trainmen is the recognized bargaining agent for the class and craft of trainmen on defendant's railroad as the Order of Railway Conductors and Brakemen is of the class and craft of conductors; and each of them has been at all pertinent times.

3. A large number of men in the craft and class of trainmen, which includes yard helpers, yard foremen, passenger and freight brakemen and flagmen, and switchtenders, have also been promoted to, have worked as, and hold seniority as conductors.

4. Section 5(c) of the union shop agreement between defendant and the Brotherhood of Railroad Trainmen specifies the result of an appeals hearing on a charge of union shop violation as follows:

> "If the decision on such appeal is that the employee has not complied with the terms of this agreement, his employment and seniority in his class or craft shall be terminated within ten (10) calendar days of the date of said decision. * * *"

5. The Brotherhood of Railroad Trainmen interprets that provision of the agreement as requiring that train service employees of defendant who are working as trainmen on the date when they are cited by the Brotherhood of Railroad Trainmen be dropped from defendant's employment, thereby terminating all of their rights to work for defendant both as trainman or as conductor, when they possess such dual rights.

6. Pursuant to said interpretation, after holding the stipulated administrative hearings — the initial hearing and the appeal hearing, when requested — the defendant issued to Charles V. Smith under date of June 4, 1956, a notice and decision holding him in violation of the union shop agreement and ordering the termination of his employment relationship with defendant, thereby depriving him of his employment status and seniority as both a trainman and as a conductor, and the defendant has heretofore effectively taken the same action in respect to other employees holding dual seniority who are similarly situated to plaintiff Smith.

7. Defendant is a stakeholder only in this controversy. With respect to the future application of the aforesaid interpretation of the union shop agreement, and equally with respect to the continued application of said interpretation to other employees who heretofore have been deprived of said employment status and seniority as conductor in similar circumstances, the defendant possesses no substantial, personal interest whatever. In respect to those matters defendant's only interest is an honest desire to administer said agreement peacefully, fairly, and lawfully. The other contracting party, the Brotherhood of Railroad Trainmen, a voluntary unincorporated association, is the real party in adverse interest.

WHEREFORE defendant prays:

(a) That the Court declare whether the lawful rights of plaintiff organization, especially those claimed under the Railway Labor Act, have been violated by the intended termination of the employment of plaintiff Smith; and

(b) Whether or not the continued denial of conductor's rights and employment status to other employees of defendant similarly situated who have heretofore been deprived of said rights also violates, or does not violate, the same alleged rights of plaintiff organization.

(c) For such other, further, or different declaration of rights as may be needful and necessary to render complete justice in the settlement of the issues.

FOURTH DEFENSE

As a separate and complete defense to the claim advanced by plaintiff Smith defendant avers:

1. Plaintiff Smith asserts rights on his behalf and on behalf of all other employees similarly situated under the collective agreement effected September 1, 1927, between defendant and the plaintiff organization.

2. Plaintiff Smith also has, or until recently had, an employment status and seniority as a trainman under a collective bargaining agreement between defendant and the Brotherhood of Railroad Trainmen (reprinted March 1, 1943).

3. Whether plaintiff Smith's employment status and seniority as conductor and the status and seniority of all other employees similarly situated have been rightfully subjected to a notice of termination depends upon the validity, meaning, and interpretation of the union shop agreement effective October 1, 1951, between defendant

and the Brotherhood of Railroad Trainmen, particularly upon a provision of Section 5(c) of said union shop agreement.

4. Issues and controversies of that nature lie within the exclusive primary jurisdiction of the National Railroad Adjustment Board under the provisions of the Railway Labor Act, 45 U.S.C.A. 151 *et seq.*, particularly of Section 3, First (i) thereof: 45 U.S.C.A. 153, First (i).

WHEREFORE defendant respectfully moves the Court to dismiss the complaint of plaintiff Smith and employees similarly situated for failure to state a claim upon which the Court can grant relief.

THE BALTIMORE AND OHIO RAILROAD COMPANY

By JOHN M. O'MARA
Union Central Building
Cincinnati 2, Ohio
By PHILIP J. SCHNEIDER
Union Central Building
Cincinnati 2, Ohio
By S. R. PRINCE
301 B&O Building
Baltimore 1, Maryland
Attorneys for defendant.

CITY OF BALTIMORE)
) SS
STATE OF MARYLAND)

R. L. HARVEY being duly sworn deposes and says: I am the Manager of Labor Relations of defendant, The Baltimore and Ohio Railroad Company, with a principal office at 2 N. Charles Street, in the City of Baltimore. As

said Manager I am the highest designated officer of defendant company under the Railway Labor Act for handling disputes and controversies arising under said Act and collective bargaining agreements made thereunder. I have read the foregoing answer of defendant company and swear that the matters and things stated as facts are true, and those stated on information and belief are believed to be true.

WITNESS my hand.

R. L. HARVEY

Subscribed and sworn to before me, a Notary Public, in and for the City of Baltimore, State of Maryland, this 13th day of August, 1956.

F. PAUL DWYER
My Commission expires May 6, 1957.

(SEAL)

MOTION TO DISMISS

Comes the defendant, The Brotherhood of Railroad Trainmen, and moves the court to dismiss the amended and substituted complaint for the following reasons:

(1) The said complaint shows on its face that there is a lack of jurisdiction in this court over the subject matter of the proceeding;

(2) The said complaint shows on its face that it fails to state facts upon which relief can be granted.

J. A. CULBERTSON
905 First National Bank Bldg.
Cincinnati 2, Ohio
Telephone — MAin 1-2260

CERTIFICATE

J. A. CULBERTSON, hereby certifies that he is attorney for the defendant, The Brotherhood of Railroad Trainmen and that he has on this 27th day of August, 1956, served a copy of the foregoing motion on Joseph A. Segal, one of the attoneys for the plaintiffs by mailing a copy thereof to said attorney at 1616 Union Central Building, Cincinnati, Ohio, and has served a copy of said motion on V. Craven Shuttleworth, another of the attorneys for the plaintiffs, by mailing a copy of said motion to the said attorney at 1120 Merchants National Bank Building, Cedar Rapids, Iowa, and has served a copy of said motion on Philip J. Schneider, one of counsel for the defendant, The Baltimore & Ohio Railroad by mailing a copy to him at 1318 Union Central Building, Cincinnati 2, Ohio, and has served a copy of said motion on S. R. Prince, another of counsel for the defendant, The Baltimore & Ohio Railroad Company by mailing a copy of said motion to the said attorney at 301 B. & O. Building, Baltimore 1, Maryland.

J. A. CULBERTSON

ORDER OVERRULING MOTION TO DISMISS

This matter coming before the court on the motion of the intervenor-defendant, Brotherhood of Railroad Trainmen, to dismiss the Amended and Substituted Complaint herein was submitted to the court on argument by counsel for the parties on consideration whereof the court finds the said motion not well taken.

It is therefore considered by the court in accordance with said finding that the said motion should be and it hereby

is overruled, to which ruling of the court, the said Brotherhood of Railroad Trainmen excepts.

The said defendant, Brotherhood of Railroad Trainmen is hereby granted 10 days in which to answer herein.

J. A. CULBERTSON
Attorney for Brotherhood of
Railroad Trainmen

Have seen
JOSEPH A. SEGAL and CHARLES A. HASTINGS
of Counsel for plaintiff.

Have seen
S. R. PRINCE
Attorney for defendant Railroad Co.

ANSWER OF DEFENDANT BROTHERHOOD OF RAILROAD TRAINMEN TO THE AMENDED AND SUBSTITUTED COMPLAINT.

Brotherhood of Railroad Trainmen, a voluntary unincorporated railroad labor organization, national in scope, intervenor-defendant herein for its answer to the amended and substituted complaint states:

FIRST DEFENSE

1. That not intending to waive the objections to said amended and substituted complaint as set forth in its motion to dismiss heretofore filed herein, nor its objection to the court's overruling the said motion, it hereby reasserts its said objections and says there is a lack of jurisdiction in this court over the subject matter of the proceeding, and the amended and substituted complaint shows on its fact that it fails to state facts upon which relief may be granted.

Answer of Defendant Brotherhood

SECOND DEFENSE

1. Defendant admits the averments of Paragraph 1 of the amended complaint.

2. Defendant admits the averments of Paragraph 2 of the amended complaint

3. Defendant admits the controversy complained about in the amended petition arises under the Railway Labor Act as amended, 45 U.S.C.A., Sec. 151, et seq.; that the matter in controversy exceeds $3000.00, exclusive of interest and costs, but denies that the proceeding is founded on diversity of citizenship.

4. Defendant admits that plaintiffs purport to have instituted their proceeding in behalf of themselves and all other employees of the defendant, The Baltimore & Ohio Railroad Company, belonging to the class and craft of conductors represented by the Order of Railway Conductors and Brakemen, similarly situated, but denies that persons similarly situated are so numerous as to make it impracticable to bring all of them before the court; and, for further answer and for want of knowledge defendant denies that plaintiffs adequately represent such class or such particular employees or represent them at all.

5. Defendant denies, that plaintiff, Smith, is employed as a regularly assigned conductor by the defendant, The Baltimore & Ohio Railroad Company, and for want of knowledge denies that plaintiff, Smith, has been an employee of the defendant, The Baltimore & Ohio Railroad Company, since 1929 and that he holds seniority as a conductor from and after August 6, 1944.

6. Defendant admits the averments of Paragraph 6 of the amended complaint except for want of information it denies that the plaintiff organization has been the exclusive bargaining representative of the class and craft of

conductors on the railroad of the defendant, The Baltimore & Ohio Railroad Company, for a period of more than 60 years.

7. Defendant denies that plaintiff Smith is employed by the defendant, The Baltimore & Ohio Railroad Company, as a regularly assigned conductor as averred in Paragraph 7 of the amended complaint, and for want of information denies that plaintiff Smith is a member in good standing of the Order of Railway Conductors and Brakemen and denies that plaintiff Smith as an employee of the defendant, The Baltimore & Ohio Railroad Company works under the collective bargaining agreement of the conductors' organization, mentioned in the Amended and Substituted Complaint, and says that substantially all of the said plaintiff's work as an employee of the defendant, The Baltimore & Ohio Railroad Company, is as a trainmen.

8. Defendant admits that the defendant, The Baltimore & Ohio Railroad Company, notified plaintiff Smith that his employment with said railroad would be terminated on June 14, 1956, but denies said notification was in violation of the Railway Labor Act, which notification was upon this defendant's citation of said plaintiff, Smith for noncompliance with provisions of a union shop agreement between this defendant and the defendant, The Baltimore & Ohio Railroad Company, by the terms of which agreement this defendant says it represented and continues to represent the class and craft of employees known as trainmen, yardmen, brakemen, porters, switch tenders, yardmasters, car retarder operators and other yardmen in the service of the defendant, The Baltimore & Ohio Railroad Company, among which said class and craft represented by this answering defendant said plaintiff, Smith, is classified. Defendant admits that it does not represent the class and craft of

conductors on the railroad of the defendant, The Baltimore & Ohio Railroad Company, and admits that the union shop agreement held by the plaintiff organization with the defendant, The Baltimore & Ohio Railroad Company, does not cover or purport to cover the class and craft of trainmen and yardmen represented by this answering defendant, but says that at all the times complained of by plaintiff, Smith, in the Amended and Substituted Complaint, said Smith was working in a class and craft represented by this defendant and his employment came under the terms of the union shop agreement which this defendant had with the defendant, The Baltimore & Ohio Railroad Company.

9. Defendant denies the averment of paragraph 9 of the Amended and Substituted Complaint, and says its relations with the defendant, The Baltimore & Ohio Railroad Company, and the class and crafts it represents, are regulated and governed by the terms of a union shop agreement which this defendant has with the said The Baltimore & Ohio Railroad Company, and which was in full force and effect at the times complained about in the Amended and Substituted Complaint; and further says that plaintiff, Smith, was cited to defendant The Baltimore & Ohio Railroad Company, as a violator of said union shop agreement respecting maintenance of membership, all pursuant to the terms of said union shop agreement between this defendant and said The Baltimore & Ohio Railroad Company.

10. Defendant denies the averments of Paragraph 10 of the Amended and Substituted Complaint, and says that plaintiff, Smith's claimed membership in the Order of Railway Conductors and Brakemen is a subterfuge tactic resorted to by said Smith for the purpose of circumventing his duty and obligation to maintain membership under the union shop agreement held by the defendant, Brotherhood of Railroad Trainmen, a railroad labor organization, na-

tional in scope, having the exclusive representation of employees on the railroad of the defendant, The Baltimore & Ohio Railroad Company, in the class or craft in which said Smith is principally and usually employed.

11. Defendant denies the averments of Paragraph 11 of the Amended and Substituted Complaint, except defendant admits that the discharge of plaintiff, Smith, will terminate and remove his seniority and other rights accrued to said plaintiff as an employee of defendant, The Baltimore & Ohio Railroad Company.

12. Defendant admits that subject to the temporary restraining order heretofore issued by this Honorable Court, the defendant, The Baltimore & Ohio Railroad Company, has terminated and will continue to deny employment status and seniority to other persons whom the plaintiff organization in this proceeding purports to represent, which terminations and denials are because of the failure of such persons to comply with the requirements of the union shop agreement held by this defendant with said The Baltimore & Ohio Railroad Company and says the principal and usual work of said persons is in the class and craft represented by this answering defendant, where such persons acquired their principal seniority and other rights.

Defendant denies each and every averment in Paragraph 12 of the Amended and Substituted Complaint not in this numbered paragraph admitted to be true.

13. Defendant admits that the defendant, The Baltimore & Ohio Railroad Company, will, subject to the temporary restraining order heretofore issued by this Honorable Court, terminate the employment status and seniority of other of its employees who work principally in the class and craft represented by this answering defendant, which this answering defendant says is because of the failure of

such persons to comply with the terms of the union shop agreement between this answering defendant and the defendant, The Baltimore & Ohio Railroad Company. Defendant denies all other averments in Paragraph 13 of the Amended and Substituted Complaint not in this numbered paragraph of its answer admitted to be true.

14. Defendant denies the averments of Paragraph 14 of the Amended and Substituted Complaint.

15. Answering the first averment in Paragraph 15 of the Amended and Substituted Complaint, defendant denies the allegations thereof for the reason the plaintiff, Smith, and those similarly situated have heretofore and prior to the institution of these proceedings, nullified and abandoned any rights that had accrued to them under their employment with the defendant, The Baltimore & Ohio Railroad Company, by failing to comply with the requirements of the union shop agreement between this answering defendant and said The Baltimore & Ohio Railroad Company, which agreement was made and entered into for the benefit of plaintiff, Smith, and others similarly situated. The remaining averments of Paragraph 15 become moot upon the issuance by this Honorable Court of a temporary restraining order, but defendant denies the said remaining averments for the reasons set forth in the first sentence of this Paragraph 15 of its answer.

WHEREFORE, intervenor-defendant, Brotherhood of Railroad Trainmen, having fully answered prays that the amended and substituted complaint be dismissed.

J. A. CULBERTSON
Attorney for intervenor-defendant,
Brotherhood of Railroad Trainmen,
905 First National Bank Building, Cincinnati, Ohio

Answer of Defendant Brotherhood

STATE OF OHIO :
: SS:
COUNTY OF HAMILTON :

GEORGE T. LANGE, being first duly sworn, on oath deposes and says that he is a member of the Brotherhood of Railroad Trainmen, intervenor-defendant herein, and that he is also an officer of said organization, and that the facts set forth in the foregoing answer are true.

(Signed) GEO. T. LANGE

Sworn to before me and subscribed in my presence by George T. Lange, this 10th day of September, 1956.

(Signed) EDWARD J. UTZ
Notary Public, Hamilton Co., Ohio

CERTIFICATE

J. A. CULBERTSON hereby certifies that he is counsel for intervenor-defendant, Brotherhood of Railroad Trainmen, and that he has served counsel for the plaintiff, Joseph A. Segal, by delivering two copies of the foregoing answer to him at his office in the Union Central Building, and that he served the Baltimore & Ohio Railroad Co. by delivering two copies to its counsel, Philip J. Schneider, at his office in the Union Central Building, and certifies said deliveries were made on September 11, 1956.

J. A. CULBERTSON
Counsel for intervenor-defendant,
Brotherhood of Railroad Trainmen.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. The plaintiff, Charles V. Smith, is a resident of Hamilton County, Ohio, and is a citizen of the State of Ohio.

2. The plaintiff, Order of Railway Conductors and Brakemen General Committee of Adjustment for The Baltimore and Ohio Railroad (hereinafter called "the Conductors"), is a voluntary, unincorporated association with its principal place of business located in Cincinnati, Hamilton County, Ohio.

3. The defendant, The Baltimore and Ohio Railroad Company (hereinafter called "the B. & O."), is a Maryland corporation authorized to do business in Ohio, and is a common carrier within the provisions of the Railway Labor Act, as amended, 45 U.S.C.A., Sec. 151 et seq.

4. The intervenor-defendant, Brotherhood of Railroad Trainmen (hereinafter called "the Trainmen"), is a voluntary, unincorporated association with its principal place of business located at Cleveland, Cuyahoga County, Ohio.

5. This is an action for injunction brought by the Conductors and by Charles V. Smith for himself and others similarly situated against the B. & O. The Trainmen intervened as a party defendant. The amount in controversy with respect to the plaintiff Smith and with respect to each of the parties he purports to represent exceeds, exclusive of interest and costs, the sum of $3,000.00 The action involves and requires a determination of the validity of a union shop agreement negotiated under the provisions of the Railway Labor Act between the B. & O. and the Trainmen as interpreted and applied by the parties thereto. This court has jurisdiction of the parties to this cause and the subject matter thereof because this is a suit arising under a

law of the United States regulating commerce, the Railway Labor Act (Title 45 U.S.C., et seq.) and under Section 2201 of the Judicial Code (28 U.S.C., Section 1337).

6. The plaintiff Smith is and has been since 1929 an employee of the B. & O. He was promoted to a conductor on August 6, 1944, and holds seniority as a conductor from and after such date. Since June 1, 1956, he has been employed by the B. & O. as a regularly assigned conductor, and since that date his assignments have all been those of a regularly assigned conductor.

7. The Conductors is a labor organization, national in scope, organized in accordance with the provisions of the Railway Labor Act. It has been the exclusive bargaining representative of the class and craft of conductors on the defendant's railroad for many years and is presently certified under date of January 13, 1945, as the bargaining representative of the class and craft of conductors on said railroad, pursuant to Section 2 of the Railway Labor Act, 45 U.S.C.A., Sec. 152, and is acting as representative of said class and craft of conductors on the properties of the B. & O. pursuant to a collective bargaining agreement effective September 1, 1927, as amended, providing rates of pay, rules and working conditions for the said class and craft of conductors.

8. The Trainmen is a labor organization, national in scope, organized in accordance with the Railway Labor Act. It has been the exclusive bargaining representative of the class and craft of yard helpers, yard foremen, passenger and freight brakemen and flagmen, and switchtenders (hereinafter collectively called "trainmen"), for many years. Many of the employees heretofore represented by the Trainmen have been promoted to, have worked as and hold seniority as conductors.

9. Acting under the provisions of Section 2, Eleventh, of the Railway Labor Act, as amended, 45 U.S.C.A., Sec. 152, Eleventh, the B. & O. and the Trainmen entered into a Union Shop Agreement dated September 20, 1951, which has been effective since October 1, 1951. A copy of such agreement (hereinafter called "the Trainmen's Union Shop Agreement"), is attached to the Complaint as Exhibit "A".

10. On July 1, 1952, the plaintiff Smith, who had theretofore been a member of the Trainmen, ceased to be a member of that organization on account of failure to pay dues and was not at that time a member of any railroad labor organization "national in scope". He did not become a member of any railroad labor organization "national in scope" until after he was cited on July 28, 1952, for violation of the Trainmen's Union Shop Agreement. He became a member of the Conductors on April 1, 1956, and has remained a member of the Conductors since that date.

11. On July 28, 1952, the Trainmen notified the B. & O. that the plaintiff Smith was in violation of the Trainmen's Union Shop Agreement; plaintiff Smith was cited for this violation by the B. & O. on July 31, 1952; plaintiff Smith requested a hearing of the union shop charge on August 12, 1952; such a hearing was held on September 9, 1952; the decision in the case of plaintiff Smith was rendered on January 6, 1955, when the B. & O. notified him that his employment relationship would be terminated effective January 17, 1955; that on January 12, 1955, plaintiff Smith requested an appeal hearing, which, pursuant to notice of February 17, 1955, was duly held on February 28, 1955; and, on June 4, 1956, it was determined by the B. & O. that plaintiff Smith was in violation of the Trainmen's Union Shop Agreement between the B. & O. and the Trainmen; and, accordingly, he was notified on that date that his employment relationship with the B. & O. would be ter-

minated June 14, 1956, on account of failure to comply with the terms of the Trainmen's Union Shop Agreement.

12. The 20 other conductors named on the list attached to the Stipulation filed herein are similarly situated to the plaintiff Smith. Each of them was promoted to a conductor with the B. & O. on the date opposite his name under the heading "Seniority Date as Conductor" and holds seniority as a conductor from and after said date. The Trainmen notified the B. & O. that each of said 20 conductors was in violation of the Trainmen's Union Shop Agreement on the date set forth opposite his name under the heading "Date Cited". The B. & O. has notified each of the first 9 conductors on the list that because of his failure to comply with the Trainmen's Union Shop Agreement his employment relationship with the B. & O. would cease on the date set forth opposite his name under the heading "Date Dropped". The B. & O. has not as yet terminated the employment relationship of the last 11 conductors on the list but will do so unless restrained by this Court.

13. The Trainmen's Union Shop Agreement has been construed and acted upon by the parties thereto, being the defendants herein, to require that an employee in violation thereof shall be discharged as an employee and thereby deprived of his status and seniority not only as a trainman but also as a conductor, and the Trainmen have demanded that the B. & O., in accordance with the construction of the parties thereto, not only terminate the employment and seniority as trainmen of plaintiff Smith and others similarly situated because of their noncompliance with the said Trainmen's Union Shop Agreement, but that the B. & O. also terminate their employment and seniority as conductors because of such noncompliance; and unless restrained by this court the B. & O. will acquiesce in said demand of the Trainmen and will, because of such compliance with

the Trainmen's Union Shop Agreement, deprive and continue to deprive the plaintiff Smith and other conducton similarly situated of their employment and seniority as conductors.

14. The plaintiffs do not claim any right or relief with respect to the employment or seniority status of the plaintiff Smith or of others similarly situated as members of the class and craft of trainmen but only with respect to the employment and seniority status of the said individuals as members of the class and craft of conductors.

CONCLUSIONS OF LAW

1. This action arises under the laws of the United States regulating commerce and more particularly under the Railway Labor Act, as amended, Title 45 U.S.C.A., Section 151, et seq., and the case is, therefore, within the jurisdiction of the court under Title 28 U.S.C.A., Section 1337. Jurisdiction is also founded upon diversity of citizenship under Title 28 U.S.C.A., Section 1332. This court has jurisdiction of the subject matter of this action and of the parties thereto.

2. The action is properly brought as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of conductors similarly situated to the plaintiff Smith.

3. The Union Shop Agreement between the B. & O. and the Trainmen as interpreted and applied by the parties thereto is invalid and in violation of the Railway Labor Act, as amended, and particularly Section 2, Third, Fourth, Seventh, Ninth and Eleventh thereof, to the extent that said agreement destroys the employment and seniority rights of Smith and others similarly situated as conductors and as members of the craft and class of conductors.

4. The termination of the employment and seniority rights as conductors of the plaintiff Smith and others similarly situated because of their noncompliance with the Union Shop Agreement between the Trainmen and the B. & O. Railroad is unlawful under the Railway Labor Act, as amended, and particularly Section 2, Third, Fourth, Seventh, Ninth and Eleventh thereof.

5. The termination of the employment and seniority as conductors of the plaintiff Smith and others similarly situated is a violation, encroachment and infringement of the rights of the Conductors to the exclusive representation of the class and craft of conductors on the B. &. O. under the provisions of the Railway Labor Act, as amended, and particularly Section 2, Third, Fourth, Seventh, Ninth and Eleventh thereof.

6. Insofar as such discharges will terminate the employment status and seniority as trainmen of the plaintiff Smith and others similarly situated, the plaintiffs do not seek and are not entitled to relief with respect thereto.

7. The controversy in this case does not involve or require the interpretation of the Trainmen's Union Shop Agreement inasmuch as there is no dispute between the Trainmen and the B. & O. Railroad, the only parties to the agreement, as to its interpretation or application. The National Railroad Adjustment Board is therefore without jurisdiction and plaintiff and others similarly situated are without an adequate administrative remedy. Unless this court acts, the employment and seniority rights as conductors of Smith and others similarly situated will be terminated and destroyed, and this court has jurisdiction and power to grant injunctive relief.

8. The Conductors, as a railway labor organization, likewise do not have any administrative remedy available to them under the procedures provided by the Railway Labor

Act as the bargaining representative of the class and craft of conductors on the defendant's railroad, which rights the defendants have violated and are threatening to violate, and this court has jurisdiction and power to grant injunctive relief to protect the rights of representation of said organization.

9. Plaintiffs are entitled to a permanent injunction against the B. & O. as prayed for in the Amended and Substituted Complaint, and to a permanent injunction against the Trainmen restraining it from taking any action to require termination by the B. & O. of the employment and seniority as conductors of the plaintiff Smith and those similarly situated.

Judge,
United States District Court,
Southern District of Ohio,
(Western Division)

The defendant Brotherhood of Railroad Trainmen excepts.

J. A. CULBERTSON
Attorney for defendant Brotherhood of Railroad Trainmen

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the defendants, the Baltimore & Ohio Railroad Company and the Brotherhood of Railroad Trainmen, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them, be and they are hereby restrained and enjoined from terminating or taking any action to require the termination of

the employment status and seniority of the plaintiff Charles V. Smith and all other employees similarly situated as conductors because of their failure to comply with the Union Shop Agreement between the defendants dated September 26, 1951, and are further restrained and enjoined from continuing to deny the employment status and seniority as conductors of any employees similarly situated to said plaintiff Charles V. Smith whose employment status and seniority as conductors has been heretofore terminated because of noncompliance with said Union Shop Agreement.

2. Nothing herein shall be construed as in any manner enjoining the defendants, the Baltimore & Ohio Railroad Company and the Brotherhood of Railroad Trainmen, from terminating the employment and seniority as trainmen of the plaintiff Smith and other employees similarly situated or as enjoining the defendants from in any way taking any action to compel or require the termination of their employment and seniority as trainmen.

3. The costs of this action are taxed to the defendants.

The defendant Brotherhood of Railroad Trainmen excepts.

(Signed) JOHN H. DRUFFEL
Judge,
United States District Court,
Southern District of Ohio
(Western Division)

J. A. CULBERTSON
Attorney for Brotherhood
of Railroad Trainmen
JOSEPH A. SEGAL
Attorney for Plaintiffs
S. R. PRINCE, PHILIP J. SCHNEIDER,
JOHN W. O'MARA
Attorneys for Baltimore & Ohio Railroad Co.

TRANSCRIPT OF PROCEEDINGS
September 5, 1956

(Tr. 3) THE COURT: Are we ready to proceed with Smith against the B. & O.?

MR. HASTINGS: We are, your Honor.

MR. CULBERTSON: I think the counsel are here.

THE COURT: Well now, what are we to have this morning?

MR. CULBERTSON: Your Honor please, I have filed a motion on behalf of the Brotherhood of Railroad Trainmen, intervenor-defendant, to dismiss the action. I assume that that would be heard first.

It's a motion to dismiss on the ground of lack of jurisdiction and that no relief can be granted by this Court, two branches.

THE COURT: Well, do you want to make a brief statement of what it's about? Have you all had copies of the motion?

MR. SEGEAL: Yes, your Honor.

MR. PRINCE: Yes, your Honor.

MR. SEGAL: We think that would be the more orderly way to proceed too.

MR. PRINCE: And counsel have agreed, your Honor please, the B. & O., which is somewhat in the position of a stakeholder, to speak second in regard to the motion.

THE COURT: Well, the question of jurisdiction comes up as to the others outside of this District. Now, (Tr. 4) that's the only thing that I am disturbed about.

Make your brief statement, will you please, of what your —

MR. CULBERTSON: Well, the motion of the Brotherhood of Trainmen is on two grounds; said complaint shows on its face that there is a lack of jurisdiction in this Court over the subject matter of the proceeding, and

two, the said complaint shows on its face that it fails to state facts upon which relief can be granted.

Now, the suit is for — On the amended and substituted complaint, Smith has been a trainman for the B. & O. Railroad and as a trainman he acquired certain seniority rights and eventually became what is known in the parlance of the railroads, a conductor on the extra board.

Now, there are two separate organizations, railroad organizations, the Order of Railroad Conductors and Brakemen, and the Brotherhood of Railroad Trainmen.

The Brotherhood of Railroad Trainmen represents certain crafts of railroad workmen; among them brakemen, yardmen, hostlers and so forth.

THE COURT: But not conductors?

MR. CULBERTSON: But not conductors, no. Conductors, they take into their organization conductors and brakemen. Now, this man Smith — I am ahead of myself.

The Brotherhood of Railroad Trainmen negotiated (Tr. 5) with the railroad — or with the B. & O. Railroad what is known as a union shop agreement. That was pursuant to the terms and provisions of the Railway Labor Act as amended and effective, I think, in 1951. —

That union shop agreement provides that members of the crafts represented by the Brotherhood of Railroad Trainmen should become members of the Brotherhood of Railroad Trainmen within sixty days — that's the purport of it— within sixty days after they become employees, that is paid employees, of the railroad, or within sixty days after the effective date of the contract.

Now, as I understand the facts, Smith was an employee and trainman at the time. He did not become a member of this Brotherhood, and he was cited; and this matter has been kicked around, was in the courts over in Indiana,

and eventually thrown out of the courts of Indiana. And then he was notified that he would be discharged on June the 14th, 1956 because of nonmembership.

Now then, at the time of his citation for nonmembership he was not a member of the Order of Railroad Conducton.

THE COURT: Say that last over.

MR. CULBERTSON: I say, at the time he was cited for nonmembership in the Brotherhood of Railroad Trainmen, and for the default for which he was ordered discharged, he was (Tr. 6) not then a member of the Order of Railroad Conductors.

THE COURT: Well, how long ago was that?

MR. CULBERTSON: My recollection is that he was cited in '52.

THE COURT: Well now we are in '56.

MR. CULBERTSON: We are now in '56. Anyhow, it's been drawing on. As I say, it was in court in Indiana. Then after the matter was dismissed in Indiana, why then, the proceeding went on and he was found not to be in compliance with the union shop agreement, and he was ordered discharged.

Now then, subsequently, after that finding, then he became and sought refuge in the Order of Railroad Conductors. They undertook to give him a haven by accepting him as a member of the Order of Railroad Conductors.

Now, they haven't said anything about that in the petition. The substituted and amended petition is drawn as if he were only a conductor. The facts are that until just recently he had worked only — well, I think maybe about a couple of times as a conductor in about a year.

I think the facts would show that, that he had worked, up to the time that he was cited for discharge in the past year before that, that he had worked only about twice as a conductor, being on the extra board. The rest of the

time, the other times he had worked, he has worked as a trainman and within the class and craft that's represented by the (Tr. 7) Brotherhood of Railroad Trainmen.

Now, he seeks now here to avoid being discharged because he claims that he is a member of the Order of Railroad Trainmen.

THE COURT: Let's get right down to the facts in the case.

MR. CULBERTSON: Yes.

THE COURT: What you are trying to do is to punish this man, aren't you?

MR. CULBERTSON: We are trying to punish him?

THE COURT: Yes.

MR. CULBERTSON: No. We are trying to seek compliance with the union shop agreement which the Brotherhood of Railroad Trainmen has with the Baltimore and Ohio Railroad.

THE COURT: But then, aren't you trying to step over into the Conductors' territory where they have a contract with the B. & O.?

MR. CULBERTSON: No. On the contrary, I think that they are trying, by their action — I think that they are trying to step over into our territory, the Brotherhood of Railroad Trainmen, because this man was usually and principally employed as a trainman and only occasionally as a conductor.

And then when we cite him and he is found guilty of noncompliance with the Brotherhood's contract, in whose craft and class he usually and principally worked, then he (Tr. 8) sought a haven in the Conductors Union to try to circumvent the conduct of which he had been guilty in not complying and not supporting the contract of the Brotherhood of Railroad Trainmen.

THE COURT: Now, haven't we reached a point – We have been over a lot of this. Haven't we reached a point where there should be a stipulation of some kind between the parties as to what the real facts are?

MR. CULBERTSON: Well, I suspect that a stipulation might be formulated. I don't know. There hasn't been any effort. I think the suggestion is a good one, and I think some effort might be made.

THE COURT: Well, it seems to me, in view of your position and in view of what was just suggested by the Court, that what we ought to do is to agree on the facts as to the real status of the plaintiff Charles V. Smith here –

MR. CULBERTSON: Yes. Well –

THE COURT: –whether or not he is making any claims to his rights as a brakeman –

MR. CULBERTSON: Yes.

THE COURT: –or whether he is standing on his rights as a conductor.

MR. CULBERTSON: Yes.

THE COURT: Could we work out something like that, what the facts are?

(Tr. 9) MR. SEGAL: The B. & O. has filed an answer in which they virtually admitted all the essential facts alleged in the complaint. I don't think there is any dispute about the facts. We can work out a stipulation –

THE COURT: Mr. Culbertson has put a dispute into the facts right now with his –

MR. CULBERTSON: There is a dispute as to the content of this petition, I mean the purported content of that petition, because it purports to represent that this man is nothing but a conductor –

MR. SEGAL: No.

MR. CULBERTSON: –and he has been nearly everything else but a conductor.

MR. SEGAL: We allege in the petition, in the complaint, that Mr. Smith was promoted to the status of conductor in 1944, and that he has held a status in the craft of conductors and seniority in that craft since 1944, for a period of twelve years. The B. & O. admits that, and it's unquestionably true.

We can try to work out a stipulation. I think we could prove all the facts through evidence in a very short time.

THE COURT: What is your position now, that he is just using the conductors as a haven, meanwhile making a living as a brakeman?

(Tr. 10) MR. SEGAL: That is not our position. Our position is that he was promoted to a conductor in 1944. At that time he then held what is known as a dual seniority; that is, he had seniority both as a trainman or brakeman and as a conductor.

He is now working as a regularly assigned conductor and has been for some months.

MR. CULBERTSON: But under protest from the man?

MR. SEGAL: The important fact is that he was promoted and attained status and seniority as a conductor twelve years ago.

Now, the relief we ask for relates only to Smith's status as a conductor. We have very carefully drafted the complaint to limit the relief to his position as a conductor. We don't deny or dispute the right of the Brotherhood of Trainmen to demand Smith's discharge as a trainman and to demand termination of his seniority as a trainman.

All that we claim is that it's illegal, since he has been a conductor since 1944 and is now working as a regularly assigned conductor, to effect his employment or his seniority as a conductor.

THE COURT: And you are making no claim he has any rights as a brakeman?

MR. SEGAL: Exactly.

THE COURT: Couldn't that all be reduced to a (Tr. 11) stipulation and put it right up clean-cut? Would that satisfy you, Mr. Culbertson?

MR. CULBERTSON: Well, I am willing to undertake to — I don't know. I feel that we might work out a stipulation. I don't know. There has been no effort. I don't think there is any wide area of dispute about the facts.

But it's our contention, will be our contention, that his right to be a conductor is predicated upon and rests upon the rights, the seniority rights, that he has acquired as a trainman. In other words, he can't be a conductor until he has acquired rights as a trainman. And then when he loses and forfeits his rights as a trainman, then some other trainman has a right to step up and to become a conductor.

In other words, that's the substructure on which his right to be a conductor rests.

THE COURT: Oh, well, you are taking in too much territory I think.

MR. CULBERTSON: No. We are taking in the facts.

THE COURT: No. I tell you, you are limited to your contracts and not to your interpretation with the additions. I tell you now, these gentlemen are from out of town.

MR. CULBERTSON: Yes.

THE COURT: We want to have a clear-cut issue. The question at this point now is whether the promotion conductor rights have been established, and if they are not (Tr. 12) bound by the contract between the B. & O. and the Conductors Union, and that you are waiving any rights as a brakeman to —

You see, Mr. Culbertson now has injected another issue into it; and I think we ought to have a clean-cut issue here as to whether or not Mr. Smith, having acquired certain rights as a conductor, and which the B. & O. admits, and since the Conductors are parties plaintiff, whether or not their contract with the B. & O. is within the limits here; and that you are not making any claim as a trainman and that you are standing strictly on his rights acquired as a conductor.

MR. SEGAL: That is correct.

THE COURT: Now, if you would stipulate those facts and, if you want to, come in here Friday with the stipulation, we could decide this cause because it seems to me it's a clear-cut issue.

But what I mean to say in the beginning was, we have Charles V. Smith here in this case, and the B. & O. has given us a list of twenty-one others. I don't think that this Court has any authority other than the precedent that's established here, unless you could work it out. It would have to be in those districts where those other men reside.

MR. SEGAL: As I understand the law in a representative action if the Court has proper jurisdiction with respect to the named plaintiff, in this case Smith, then (Tr. 13) it has proper jurisdiction as to all persons whom he properly represents.

I would like to check into that question. We have assumed that without going into it; but the Court certainly has jurisdiction of the defendants.

THE COURT: The ones that are here in Court.

MR. SEGAL: I mean of the defendants.

THE COURT: Oh, yes, the defendants. That's right.

MR. SEGAL: They are all in Court. As far as the plaintiffs are concerned, my understanding is that if it is a proper class suit, as I think it is, then the only test of

jurisdiction as to all plaintiffs, both the named one and those who are represented, is whether the named plaintiff is properly in Court.

THE COURT: Well, I am willing to go as far as we can; but I think that we should agree on the facts before we --

MR. PRINCE: If your Honor please, I think that there is virtually no dispute about the facts. It is certainly undisputed, even by the trainmen, that this man was promoted and did acquire rights as a conductor.

Now, as your Honor knows, in those two crafts, a man works first in one and then in the other, according to the demand for services and the volume of business.

Now, he did therefore, before 1952, work as a regularly assigned conductor at certain periods, presumably (Tr. 14) during the war. Now, since that time he has also worked from one period to another as a conductor.

The only possibility of a disagreement about facts that's here today is this: In the complaint it's alleged that he is presently -- Now, that same allegation came in the amended complaint. Our information is that the flow has moved the other way and he has been carried back, that he is not presently working as a conductor.

From our point of view, while that fact is in some doubt, and will be from day to day, depending on what the flow is we don't think that that will be an important point because, nonetheless, he is here claiming his conductor's seniority. He has conductor status.

As your Honor knows, it is possible, and other men do possess conductor status without trainman status, under some exceptional circumstances, just as they might possess engineer's seniority and not fireman's seniority.

I think that there is no question that the two statuses are entirely separate, that this man does possess the status of conductor. He did possess both statuses with his company.

Now, I understand the complaint quite well, that they don't object to what the railroad has done at the instance of the Brotherhood in taking from him his trainman's status and seniority. They do object to the fact that the railroad (Tr. 15) at the instance of the Brotherhood of Railroad Trainmen also took from him his status and seniority as a conductor.

Now, it's on that that they say that we have applied a contract in a manner inconsistent with the status itself and that your Honor, according to the plaintiffs, has jurisdiction because of the question of validity, not of interpretation, of the contract.

THE COURT: Well, it seems to me — Did you have something to say?

MR. HASTINGS: Well, I was going to say this, your Honor. In so far as this motion to dismiss of the Brotherhood of Railroad Trainmen is concerned, we have no problem in so far as the facts are concerned because it accepts the facts as pleaded in the complaint, the amended and substituted complaint, as true, and then attacks that complaint on the basis that it does not state a claim.

So we are not concerned with these various collateral allegations that the Brotherhood of Railroad Trainmen may make as to the merits and the eventual trial on the merits.

And when we limit ourselves to the motion, to which Mr. Culbertson is addressing himself, these various other facts that he brings in are collateral. They may well become relevant in the trial on the merits. But now we are concerned with this motion to dismiss, and he is attacking (Tr. 16) this complaint as it is written, admitting the facts which it alleges to be true.

THE COURT: Well, the motion to dismiss will be overruled.

Now, the question is: Do you want to get together on a stipulation as to the facts by which we can have a clear-cut ruling on a clear-cut issue?

Now, we will have to assume, of course, that the contract between the Conductors and the B. & O. has control of the conductors. We will have to assume that the contract between the B. & O. and the Order of Trainmen controls the trainmen.

Now, in view of what Mr. Segal said, they are not making any claim that he has any rights at all as a trainman any more. Is that right?

MR. SEGAL: That's correct.

THE COURT: Well, I don't see that there should be any difficulty about arriving at a stipulation as to the facts. Do you want to try to work it out?

MR. CULBERTSON: Why, I am willing. I expressed myself that way in the beginning.

MR. PRINCE: I am happy to cooperate. I think it should be a relatively simple matter.

MR. SEGAL: If the Court please, we were prepared to go ahead with the evidence today. We think we can present (Tr. 17) the entire case with two witnesses in less than half an hour. I think it will be quicker than a stipulation, actually.

THE COURT: All right. If you want to, let's go ahead.

Just excuse me a minute. Do you have this naturalization matter?

(Thereupon another matter came before the Court, following which the following proceedings were had:)

MR. SEGAL: I was just taking with Mr. Culbertson and Mr. Hastings. We thought perhaps, if it's convenient

with the Court, we might adjourn until after lunch and see what — It's possible we could work out a stipulation or some kind of procedure to move very quickly in that time.

THE COURT: All right. Let's do it that way. Then we will recess this case until 2:00 o'clock. Is that right? You will all be here at 2:00 o'clock.

MR. CULBERTSON: I haven't filed an answer. If you are overruling my motion —

THE COURT: Yes.

MR. CULBERTSON: —I assume that maybe I ought to file that answer; and I don't believe I could get that done before tomorrow.

THE COURT: Well, that's all right. We wil anticipate that you can tell them what your answer will be.

MR. CULBERTSON: Yes. It will be — They likely (Tr. 18) know pretty well what it is, without saying anything.

MR. PRINCE: There was an answer filed to the first complaint, so that —

MR. CULBERTSON: It will be along that same line.

MR. PRINCE: —it will be along the same line, I believe.

THE COURT: All right. We will recess until 2:00 o'clock.

(Thereupon, at 11:45 o'clock A. M. a recess was taken in the above-entitled action until 2:00 o'clock P. M., this same day.)

(Tr. 19) AFTERNOON SESSION — September 5, 1956. — 3:45 o'clock P. M.

(All counsel being present as heretofore noted, the hearing in the above-entitled action continued as follows:)

MR. SEGAL: If the Court please, I think I can speak on behalf of all counsel when I say that we regret that we delayed you so much —

THE COURT: Well, that's all right.

MR. SEGAL: —but we have a stipulation that was dictated by all counsel jointly that has been signed by the attorneys for the B. & O. and by the attorneys for the plaintiff.

Mr. Culbertson informs me that he thinks the facts are correct, but, inasmuch as he is working with cocounsel in Cleveland, he feels that he shouldn't sign it until he has sent it to Mr. Sullivan.

MR. CULBERTSON: Yes. He is the assistant general counsel of the Brotherhood. I feel that before I approve it with a signature I ought to advise him of it.

THE COURT: Well, c> . we do this: You submit the stipulations, and when will you have the answer from Mr. Sullivan?

MR. CULBERTSON: Well, I don't know where he is. If he is in Cleveland, I ought to have it very shortly. I will telephone as soon as I leave here.

(Tr. 20) THE COURT: Well, the status quo will be maintained until we hear from Mr. Sullivan through you.

MR. CULBERTSON: All right.

THE COURT: Well, we will reserve decision then on the merits of the case.

Now, the stipulations, as I understand, represent the facts agreed to by the plaintiffs and by the B. & O.?

MR. PRINCE: Yes, sir.

MR. SEGAL: That's correct.

THE COURT: Is that right?

MR. PRINCE: That's correct, sir.

THE COURT: Now, if Mr. Culbertson is directed not to agree to the stipulation we can still accept the stipulations and decide the issues and you will have your objections or exceptions.

MR. CULBERTSON: Yes. I ought to have a little time in which to communicate with him, and I think it will be signed.

THE COURT: You think it will be signed?

MR. CULBERTSON: I do, yes.

THE COURT: Well then, there is a question that I think should be determined while we are here.

Your prayer here is an injunction restraining the discharge of the plaintiff Smith; is that right?

MR. SEGAL: Yes, and also to enjoin the discharge (Tr. 21) of others similarly situated.

THE COURT: Well now, that's what I am coming to. You can very well agree here as to Smith's status by stipulation. The question is whether or not a valid objection might not be raised about fitting all the others into the stipulation that we agree upon here.

Then it seems to me, if the decision is against your Brotherhood of Trainmen, you intend to take an immediate appeal; is that right?

MR. CULBERTSON: That's right; sure.

THE COURT: Well, it would seem to me that you would accomplish just as much if you then made an agreement to maintain the status quo as to all the others pending the decision of the Court of Appeals. Isn't that logical?

MR. PRINCE: So far as the B. & O. Railroad is concerned, we are willing to enter into such a stipulation if all of the other parties will join in that stipulation.

THE COURT: Well now, in the event they don't join in the stipulation, then you may force this Court's hand and go all the way. But I thought, you know, rather than to put in what might be a valid objection, to maintain the status quo by stipulation.

How does that strike you now?

MR. HASTINGS: Well, I am certain that would be agreeable to us, your Honor.

(Tr. 22) I had one question, which is somewhat collateral, but as far as we are concerned —

THE COURT: It would have the same effect.

MR. HASTINGS: It would have the same effect. And, as Mr. Prince says, the B. & O. is agreeable to that if everybody else is, and we are.

MR. PRINCE: One thing occurs to me in that connection, your Honor. It would still leave, would it not, after a decision by the Court of Appeals, let us say, affirming; the status of the other twenty-one men would still be a litigable issue, would it not?

THE COURT: It could be either way. You see, it could be either way. I imagine that in an appeal you would be raising this class issue, raising the status of the others as a secondary deal; but the effect of the Court of Appeals' decision would be not more effective than just a District Court.

MR. PRINCE: I think I understand your Honor. But it is true that some of the men not only live beyond the jurisdiction of the District Court, but also beyond the Circuit Court.

THE COURT: I understand that. But the Circuit Court has a way of doing things that has much more effect than what a District Court would say.

MR. PRINCE: Well, the railroad is willing to (Tr. 23) stipulate if the other defendant is of the same opinion as to the propriety of it.

MR. CULBERTSON: Well, I wouldn't want to stipulate either until I had conferred with Mr. Sullivan about it.

THE COURT: We are not trying to bind you.

MR. CULBERTSON: Yes.

THE COURT: But I mean the attitude up to now by all the parties is to maintain the status quo until today; and we gave you a couple of months.

You will take an immediate appeal. If you will stipulate then that the status of the others will be maintained as is now pending the decision of the Court of Appeals, all right. Then you can work it out with the Court of Appeals.

If not — For instance, if your people are not willing to do that, then you may force this Court to decide as a class matter altogether; but we may have to have another hearing. That's the only thing as to the others.

MR. CULBERTSON: Well, I think that if Mr. Sullivan is available today or tomorrow, I could let you know by tomorrow afternoon. I mean if I can get hold of him by phone, I will be glad to do it.

THE COURT: Now, you understand what we are talking about now, that there is no question in your mind as to what is intended. Now, I am assuming —

MR. CULBERTSON: I know. If your decision is (Tr. 24) against me, you want it understood that this status quo as to these men, and each and every one of them, irrespective of where they may be, it will be maintained as of now until the Court of Appeals —

THE COURT: That's right.

MR. CULBERTSON: —rules.

THE COURT: That's rght.

MR. CULBERTSON: I thought I understood you. Then, of course, that's what I will communicate to Mr. Sullivan.

THE COURT: You see, I would like to leave open the question as to the others because, while we are agreeing on the stipulations as to the status of Smith, there might be some differences in the other cases and we couldn't fit the stipulations here which fit Smith; they may not fit somebody else in one hundred per cent particulars.

MR. CULBERTSON: Yes.

THE COURT: Well now, do you want to submit that then?

MR. SEGAL: Yes.

THE COURT: Let's have it. Then when I hear from Mr. Culbertson, then we can decide the case on the merits based on the stipulation.

MR. HASTINGS: May I ask one question, your Honor?

THE COURT: Yes.

MR. HASTINGS: I think your Honor has answered (Tr 25) it; but the temporary restraining order ran until today. Now, I take it you are taking this matter under advisement; and the restraining order, of course, would continue during that period.

THE COURT: That's right. I suggested that in the beginning, that we will maintain the status quo pending the decision on the merits.

MR. HASTINGS: That's what I understood you to say, and I thought that was what you meant.

MR. CULBERTSON: Well, I am agreeable to that.

THE COURT: What I am asking you to do in the other instances, in case I decide against you, is that it will be to the same effect.

MR. CULBERTSON: Yes, but I assume that would be a considerable longer period.

THE COURT: Oh, of course.

MR. CULBERTSON: I don't think —

THE COURT: Well, Mr. Culbertson, I am trying to make it easy for your people, the same as the Conductors you see.

Now, if I decided against you and went all the way, what difference would it make if you maintain a status quo as to the others, all except Smith, pending a decision, or if I decided against you all the way.

MR. CULBERTSON: So far as I am personally (Tr. 26) concerned, I see the point and I am agreeable to it. I just don't want to be consenting to the position until I have an opportunity to confer with Mr. Sullivan.

He couldn't be down here today. He had expected to be. But, Mr. Prince, you talked with him yesterday, didn't you?

MR. PRINCE: No. My associate talked with him.

MR. CULBERTSON: Your associate talked with him. But I had talked with him, and he had told me that it was just impossible for him to be here.

THE COURT: Well, that's all right. Do you have any —

MR. SEGAL: Should we present a formal entry extending the restraining order?

THE COURT: If you think it's important. We are making a record right here. I would say verbally it will be continued.

MR. SEGAL: I think that's all.

MR. HASTINGS: That's more than ample.

MR. PRINCE: I would like, your Honor, that the stipulation might be transcribed into the record because some of the exhibits with them were single copies, of which the parties don't themselves retain copies.

THE COURT: Well, that will go in the record.

THE REPORTER: I will get it, your Honor.

(Tr. 27) MR. CULBERTSON: I take it that the stipulation is being offered in evidence, is it?

MR. SEGAL: It is being filed. It's made a part of the transcript.

MR. CULBERTSON: Yes.

THE COURT: Well, all right; when we hear from Mr. Culbertson, we will —

MR. CULBERTSON: What?

THE COURT:: I say, when we hear from you — That will give us a couple of days to go over the stipulation; and I think that we better have another hearing in open Court and decide the case on the merits then.

And I thought that local counsel could be here representing the parties. It's unnecessary for out-of-town counsel to be here. Is that all right?

MR. HASTINGS: That would be all right with me, your Honor.

MR. PRINCE: I am willing for your Honor to set it on short notice. I will come if I can, if my other engagements don't prevent; but otherwise, local counsel are qualified to handle it as far as we are concerned.

THE COURT: Well, let's make it definite. We will hear from you by the end of this week, Mr. Culbertson?

MR. CULBERTSON: I hope by tomorrow.

THE COURT: By tomorrow.

(Tr. 28) MR. CULBERTSON: I will try to.

THE COURT: We will fix 11:00 o'clock Monday for the decision in open Court; so your local counsel will know it will be at 11:00 o'clock, and if you want to be here —

MR. PRINCE: Thank you, your Honor. I don't know what my engagements are.

MR. CULBERTSON: Judge, I have a case that's been set for two months in Warren County for trial Monday, and I would much prefer if this could —

THE COURT: Well, let's do it this way: How about Friday at 12:00 o'clock?

MR. CULBERTSON: Of this —

THE COURT: If I hear from you tomorrow.

MR. CULBERTSON: Well, that's all right. I will try—

THE COURT: I don't want to crowd you. The point is —

MR. CULBERTSON: Well, I have had this and there are three sets of counsel in this case Monday, and they are bringing a special judge in from —

THE COURT: Well, how will next Wednesday strike you?

MR. CULBERTSON: Next Wednesday?

THE COURT: Yes.

MR. CULBERTSON: That will be fine.

(Tr. 29) THE COURT: We will make it next Wednesday at 11:00 o'clock.

MR. SEGAL: Next Wednesday at 11:00. That's the 12th, isn't it?

MR. CULBERTSON: 12th.

MR. SEGAL: Yes. That will be satisfactory.

THE COURT: And we will decide the case by next Wednesday at 11:00 o'clock.

MR. CULBERTSON: All right.

THE COURT: All right. We will adjourn until tomorrow at 10:00 o'clock.

(Thereupon, at 4:00 o'clock P. M., the hearing in the above-styled action was continued until 11:00 o'clock A. M., Wednesday. September 12, 1956.)

(NOTE: Stipulation referred to herein is copied in this record beginning on page 31, except that in the copy of the transcript filed with the Clerk (for the use by the Court) the original stipulation together with the exhibits is bound in.)

(Tr. 31) STIPULATION

It is stipulated by and between all parties hereto as follows:

1. The facts alleged in paragraphs 1 and 2 of the Amended and Substituted Complaint (hereinafter called "the Complaint") are true.

2. The defendant, Brotherhood of Railroad Trainmen, is a voluntary unincorporated association with its principal place of business located in Cleveland, Cuyahoga County, Ohio.

3. The matter in controversy with respect to plaintiff Smith and with respect to each of the parties he purports to represent exceeds, exclusive of interest and costs, the sum of $3,000.

4. The persons similarly situated to the plaintiff Smith are those shown on the list appended to the Answer of the defendant railroad company to the Complaint, being 21 in number and each of them has been heretofore promoted to conductor and now holds a seniority date as conductor, as shown in said list except it is not known how many of these men are also members of the Order of Railway Conductors and Brakemen. A copy of the list of the 21 is attached hereto and made a part hereof.

5. Plaintiff Smith is and has been since 1929 an employee of defendant railroad. He was promoted to a conductor on August 6, 1944 and holds seniority as a conductor (Tr. 32) from and after such date. Since August 6, 1944 he has from time to time served as a regular conductor. Attached hereto is Bulletin Number 82 of the Indianapolis Division of defendant railroad which shows that under a previous Bulletin Number 80 of August 2, 1956 C. V. Smith bid in and was assigned to a position as conductor of regularly assigned Pool Number 1. And this Bulletin further shows by advertising for vacancy for the position of conductor on regularly assigned Trains Numbers 95 and 96 that said Smith, prior to August 10, occupied that position, to wit: conductor of regularly assigned Trains Numbers 95 and 96. Conductor Smith still holds his assignment of regular conductor of Pool Number 1 of the Indianapolis

Division. Since June 1, 1956 his assignments have all been those of a regularly assigned conductor.

6. The Order of Railway Conductors and Brakemen is a labor organization national in scope organized in accordance with the provisions of said Railway Labor Act. Said organization has been exclusive bargaining representative of the class and craft of conductors on the defendant's railroad for many years and is presently certified under date of Jan. 13, 1945, as the bargaining representative of the class and craft of conductors on said railroad, pursuant to Section 2 of the Railway Labor Act, 45 U. S. C., Sec. 152, and is acting as representative of said class and craft of conductors on the properties of said defendant railroad pursuant to a collective (Tr. 33) bargaining agreement effective September 1, 1927, as amended, providing rates of pay, rules and working conditions for the said class and craft of conductors. A copy of said certification of the National Mediation Board and a copy of said collective bargaining agreement are attached hereto and made part hereof.

7. On July 1, 1952 plaintiff Smith ceased to be a member of the Brotherhood of Railroad Trainmen on account of failure to pay dues and was not at that time a member of any railroad labor organization qualified as "national in scope". He remained a non-member of any railroad labor organization national in scope until after his citation of July 28, 1952 for violation of the Trainmen's Union Shop Agreement. He became a member of the Order of Railway Conductors and Brakemen for the last time and has since remained a member, since April 1, 1956.

8. The Brotherhood of Railroad Trainmen notified the defendant on July 28, 1952, that plaintiff Smith was in violation of its union shop agreement; plaintiff was cited for this violation by defendant on July 31, 1952; plaintiff

Smith requested a hearing of the union shop charge on August 12, 1952; such a hearing was set for September 2, 1952, and was, at the request of plaintiff Smith, continued to and held on September 9, 1952; the decision in the case of plaintiff Smith was rendered on January 6, 1955 when defendant notified him (Tr. 34) that his employment relationship would be terminated effective January 17, 1955; that on January 12, 1955, plaintiff Smith requested an appeal hearing, which pursuant to notice of February 17, 1955, was duly held on February 28, 1955; and, on account of judicial restraint, no decision was rendered by defendant until June 4, 1956, when it was determined by the defendant railroad that plaintiff Smith was in violation of the said union shop agreement between defendant and the Brotherhood of Railroad Trainmen; and, accordingly, he was notified on that date that his employment relationship with defendant would be terminated June 14, 1956 on account of failure to comply with the terms of the union shop agreement between the defendant railroad and Brotherhood of Railroad Trainmen. A copy of defendant railroad's notice of June 4, 1956 and its decision of the same date are attached hereto.

8(a). The Brotherhood of Railroad Trainmen is a labor organization, national in scope, organized in accordance with the Railway Labor Act. Said organization has been exclusive bargaining representative of the craft and class of yard helpers, yard foremen, passenger and freight brakemen and flagmen, and switchtenders for many years. Many of the employees represented have been promoted to, have worked as and hold seniority as conductors. Exhibit A attached to the Complaint is the agreement dated September 20, 1951 by and between defendant railroad and the Brotherhood of Railroad (Tr. 35) Trainmen, and is the union shop agreement effective since October 1, 1951.

9. Said union shop agreement has been interpreted by the defendant railroad and by the Brotherhood of Railroad Trainmen to require that an employee found to be in violation thereof shall be discharged as an employee and thereby be deprived of his status and seniority both as a trainman and as a conductor.

10. The defendant railroad has terminated and unless restrained by this court, will continue to deny the employment status and seniority of the twenty-one employees named on the list referred to in paragraph 4 hereof, solely because of the failure of such employees to comply with the terms of the union shop agreement referred to in paragraph 8(a).

11. The defendant railroad has threatened, unless restrained by this court, to terminate the employment status and seniority as conductors of others similarly situated to the plaintiff Smith for the same reasons.

12. The First Division of the National Railroad Adjustment Board consisting of ten members of whom five are known as carrier members appointed and compensated by the Class 1 railroads of the United States, including defendant railroad in this case, and that the remaining five members known as labor members are appointed and compensated one each by the Brotherhood of Railroad Trainmen, Order of Railway (Tr. 36) Conductors and Brakemen, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers, and Switchmen's Union of North America.

13. The plaintiffs do not claim any right or relief with respect to the employment or seniority status of the plaintiff Smith or others similarly situated as members of the craft and class of trainmen but only make claim as to the

employment and seniority rights of said individuals as members of the craft and class of conductors.

THE BALTIMORE AND OHIO RAILROAD COMPANY, defendant

By /s/ S. R. Prince
S. R. Prince

By /s/ John M. O'Mara
John M. O'Mara

BROTHERHOOD OF RAILROAD TRAINMEN

By .....
J. A. Culbertson

CHARLES V. SMITH, AND OTHERS REPRESENTED BY HIM, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD

By /s/ Charles A. Hastings
Charles A. Hastings

By /s/ Joseph A. Segal
Joseph A. Segal

EXHIBIT A

LIST OF TRAINMEN WITH SENIORITY RIGHTS AS CONDUCTORS WHICH SENIORITY IS SUBJECT TO TERMINATION FOR NONCOMPLIANCE WITH THE TERMS OF THE UNION SHOP AGREEMENT BETWEEN THE B&O AND THE BRT

Employee	Date Dropped	Seniority Date as Conductor	Date Cited
Wiltison, Charles A. (Cumberland Division)	5-8-54	4-19-43	2-5-54
Lathan, Edwin E. (Buffalo Division)	4-2-56	7-31-52	4-24-53
Lennox, Carl (Toledo Division)	5-24-56	9-8-54	9-24-52
Bohn, P. E. (Toledo Division)	5-24-56	9-8-54	6-29-53
Justice, J. A. (Toledo Division)	6-3-56	4-14-53	8-25-52
Bobbins, E. P. (Toledo Division)	6-14-56	11-14-51	7-28-52
Parker, C. W., Sr. (Toledo Division)	6-14-56	2-15-50	5-20-53
Smith, C. V. (Toledo Division)	6-14-56	8-6-44	7-28-52
Snurr, G. A. (Toledo Division)	6-25-56	8-17-44	7-21-53
Davis, P. B. (Cumberland W. E.)		11-5-53	4-20-53
Groves, H. H. (Cumberland W. E.)		1-8-51	4-20-53
Avers, J. A. (Cumberland W. E.)		1-17-50	4-20-53

Exhibit "A"

Employee	Seniority Date as Conductor	Date Cited
Lee, H. R. (Cumberland W. E.)	3-17-40	12-4-53
Lewis, A. W. (Cumberland W. E.)	9-28-44	12-8-52
Ball, Hubert (Cumberland W. E.)	2-25-48	11-18-52
Stafford, G. A. (Cumberland W. E.)	8-20-44	12-8-52
Albertson, E. (Cumberland W. E.)	7-25-44	10-16-52
Legeer, H. C. (Cumberland E. E.)	12-17-53	1-12-54
Davis, L. R. (Cumberland E. E.)	12-17-53	11-30-53
Trozzo, F. A. (Cumberland E. E.)	6-8-47	4-28-53
Barb, Gerald (Cumberland E. E.)	8-4-45	7-21-53

THE BALTIMORE AND OHIO RAILROAD COMPANY

Indianapolis Division

Indianapolis — August 6, 1956

TRAINMEN'S BULLETIN NO. 82

ALL TRAINMEN:

The following assignments are made as shown on Trainmen's Bulletin No. 79, dated August 1, 1956:

Brakeman for Extra Board at Decatur, Ill. — CANCELLED.

Helper, Run No. 3, 11:05 P.M. to 7:05 A.M. Yard Job at Decatur, R. M. Pygman (Temporary).

The following assignments are made as shown on Trainmen's Bulletin No. 80, dated August 2, 1956:

Pool #1 — Conductor — C. V. SMITH
Flagman — R. E. GREGORY
Head Brakeman — J. J. RAYMOND

Pool #2 — Conductor — R. C. MILLER
Flagman — A. L. PERDUE
Head Brakeman — R. J. HUEGEL

• • • • • • • • •

Bids will be received in this office until 9:00 A.M., August 10, 1956, on the following positions:

Helper Run No. 5, 12 Midnight to 8:00 A.M. Yard Job at Decatur, Daily except Wednesday and Thursday,
Vice R. M. Pygman (Temporary).

Brakeman, Trains 98 and 99, With Conductor J. F. Clark, Vice G. Seaborg.

Conductor, Trains 95 and 96, Vice C. V. Smith.

Flagman, Trains 95 and 96, Vice R. E. Gregory.

Head Brakeman, Trains 89 and 88, Vice A. L. Perdue.

W. O. Reynolds,
Trainmaster

. . . . . .

Detach and forward to Trainmaster's Office, Indianapolis, Indiana.

Trainmen's Bulletin No. 82, dated August 6, 1956, posted:

Location .....Date ..... Time .....

By .....

National Mediation Board Certification

NATIONAL MEDIATION BOARD

Washington

In the matter of

REPRESENTATION OF EMPLOYEES

of the

BALTIMORE AND OHIO RAILROAD COMPANY
Road Conductors

CASE NO. R-1280

Certification

January 13, 1945

The services of the National Mediation Board were invoked by the Brotherhood of Railroad Trainmen to investigate and determine who may represent road conductors employed by the Baltimore & Ohio Railroad Company, for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof.

At the time application was received these employees were represented by the Order of Railway Conductors.

The Board assigned Mr. Matthew E. Kearney, Mediator, with the assistance of Mr. James M. Holaren, Mediator, to conduct investigation, and after finding that a dispute existed among the employees concerned directed him to take a secret ballot to determine their choice, using an eligible list agreed to by representatives of the contesting organizations.

During the course of the investigation the Order of Railway Conductors raised two points upon which the

mediator was not able to secure an agreement of the parties and upon which a ruling of the Board was requested. This organization contended that --

1. The Board should give consideration to certain counter authorizations which the Order of Railway Conductors submitted purporting to cancel the authorizations filed by the Brotherhood of Railroad Trainmen supporting its application; and,
2. The dispute should not include the Buffalo, Rochester and Pittsburgh Railway Company nor the Buffalo, Susquehanna Railroad Corporation which should be considered as separate carriers because the agreements in effect on these two roads, made prior to 1932, when the Baltimore and Ohio Railroad Company took them over as subsidiaries, have been continued as separate agreements.

The Order of Railway Conductors subsequently withdrew its request for separation of the two subsidiary railroads named in Item 2, above. The Board disposed of Item 1 on the basis of prior rulings on similar points in other cases by advising the parties as follows:

THE BALTIMORE AND OHIO RAILROAD COMPANY

OPERATING DEPARTMENT

RULES AND RATES OF PAY FOR CONDUCTORS

GENERAL RULES

Rule 1

(p. 17) The right to represent conductors in making agreements, rules and rates of pay, and in handling grievances shall be vested in the regularly constituted committee representing the conductors on the Baltimore and Ohio System. This, however, does not abridge the right of any conductor to take up a personal grievance with officers of the Company, either by personal representation, or through the committee of the organization with which he is affiliated.

Rule 3

(p. 19) (a) The rights of conductors will date from date of promotion. Extra trips made by men who have not passed examination will not count. Rights to runs and promotions on the several districts and divisions will be preserved on the respective territories as in effect prior to January 1, 1902 on the Baltimore and Ohio; January 1, 1912, on the Baltimore and Ohio Southwestern Railroad. For all men entering the service subsequent to January 1, 1902, on the Baltimore and Ohio Railroad, January 1, 1912 on the Baltimore and Ohio Southwestern Railroad, right to runs and promotions will be confined to the respective divisions. This rule to apply to all merged territory, and to become effective on date of merger.

• • • • • •

(n) Rights to runs and promotions will be governed by merit, ability, and seniority. Freight conductors deprived of their rights to passenger service, will upon request be furnished with written statement from the Superintendent showing cause.

New runs and vacancies will be bulletined for five days before being filled. Conductors who are on leave of absence or sickness or who are under suspension at the time runs or vacancies are advertised, and therefore have no knowledge of such advertisements will be permitted to make application for runs or vacancies as advertised, provided they do so within three days after returning to work.

Conductors reduced either by runs being abolished, reductions of crews, or through being displaced from a temporary vacancy, will be required to exercise their seniority within three days after being displaced.

* * * * * *

(u) Conductors discharged from the service of the company will forfeit their seniority unless reinstated within one year, or unless the committee has the case pending. The local chairman, upon request, will be furnished information in writing relative to conductors dismissed. Local chairman will be furnished with copy of leave of absence or transfer of conductors under their immediate jurisdiction.

Conductors leaving service of their own accord forfeit their seniority. A conductor may be given a leave of absence which shall be for a definite period of time and not exceeding twelve months, except in cases of sickness or committee work, and at expiration of same or prior thereto, will, upon making application to his proper officer, resume his employment without loss of seniority.

Rule 7

(p. 27) (d) Should any employee subject to this agreement believe he has been unjustly dealt with, the case shall be taken to the Superintendent by the employee or his representative, or by the duly authorized committee or their representative. If the result still be unsatisfactory the right of appeal shall be granted; the appeal to be made in writing to the higher officers designated below;

Questions involving rates of pay and alleged violation of schedule rules — Assistant to Vice-President.

Grievances involving discipline — General Superintendent; Assistant to Vice-President.

If it is found the employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said suspension or dismissal.

Rule 42

(p. 45) This agreement supersedes and cancels all former agreements, but does not, except where rules are changed, alter former accepted and agreed to practices, working conditions or interpretations.

Except as otherwise specified, this agreement shall be effective September 1, 1927, and shall continue in effect for a period of one year and thereafter unless and until changed by agreement following thirty (30) days' notice of one party to the other of desire for change.

Railroad's Letter to Smith of June 4, 1956

THE BALTIMORE AND OHIO RAILROAD COMPANY

OFFICE OF VICE PRESIDENT

PERSONNEL
BALTIMORE 1, MD.

R. L. HARVEY
Manager Labor Relations

June 4, 1956

Mr. Charles V. Smith
c/o Supt. J. F. Robbert
Dayton, Ohio

Dear Sir:

Referring to my letter dated January 6, 1955, advising that you were to be dropped on January 17, 1955 because of your failure to comply with the terms of the Union Shop Agreement between the Brotherhood of Railroad Trainmen and this Company, which Agreement was effective on October 1, 1951.

As you know, you appealed my above mentioned decision and an appeal hearing was held in your case. The decision on your appeal hearing was held in abeyance because of the issuance of a temporary restraining order by the Superior Court of Marion County, Indiana, against the Brotherhood of Railroad Trainmen and this Company, which restrained the Brotherhood of Railroad Trainmen and this Company from fully complying with the terms of the said Union Shop Agreement while the temporary restraining order was in effect.

The temporary restraining order that was issued by the Superior Court of Marion County, Indiana, has been dis-

solved and attached is decision by Mr. George Herbig, Examiner of this Company, who served as the hearing officer at your appeal hearing.

Pursuant to the attached decision on your appeal hearing, your employment relationship with The Baltimore and Ohio Railroad will cease as of the date stated in the decision on your appeal hearing.

Yours truly,

R. L. Harvey

Mr. W. C. Lester, General Chairman
Brotherhood of Railroad Trainmen
11705 Detroit Ave., Lakewood 7, Ohio

Mr. S. A. Cadwallader
3841 O'Leary Avenue
Cincinnati 36, Ohio

DECISION ON APPEAL HAD PURSUANT TO THE PROVISIONS OF PARAGRAPH 5(c) OF UNION SHOP AGREEMENT EFFECTIVE OCTOBER 1, 1951 BETWEEN THE BALTIMORE AND OHIO RAILROAD COMPANY AND CERTAIN EMPLOYEES REPRESENTED BY THE BROTHERHOOD OF RAILROAD TRAINMEN IN THE CASE OF CHARLES V. SMITH.

Appeal hearing in the above entitled matter was held in Baltimore, Maryland, on February 28, 1955 at which hearing the record indicates all parties involved were either present in person or duly represented.

The record discloses that Mr. Charles V. Smith appealed, pursuant to the provisions of Section 5(c) of Union Shop Agreement, effective October 1, 1951, Manager Labor Re-

lations R. L. Harvey's decision dated January 6, 1955, dropping him from service because of failure to comply with the terms of said Union Shop Agreement.

The decision on appeal is that Mr. Charles V. Smith failed to comply with the provisions of said Union Shop Agreement, in that at the time of the hearing on September 9, 1952, he did not hold nor had not acquired membership in the Brotherhood of Railroad Trainmen, nor in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service.

Accordingly, the decision is that pursuant to the terms of said Union Shop Agreement, the employment relationship of Mr. Charles V. Smith with the Baltimore and Ohio Railroad Company is terminated effective June 14, 1956 and his service record will be marked:

> "June 14, 1956 — Dropped account failure to comply with the terms of the Union Shop Agreement, effective October 1, 1951, between the Baltimore and Ohio Railroad Company and the Brotherhood of Railroad Trainmen."

George Herbig

Examiner

Dated — Baltimore, Maryland
June 4, 1956

TRANSCRIPT OF PROCEEDINGS
September 12, 1956

(Tr. 3) THE COURT: Well, are we waiting to hear from Mr. Culbertson at this point?

MR. CULBERSTON: Waiting for me?

THE COURT: We have been for about four or five days.

MR. CULBERTSON: Well, I don't think I have been in default for anything, have I?

THE COURT: No, you haven't been in default. The point is this: You were going to let us know what Mr. Sullivan's views are.

MR. CULBERTSON: Well, I set them out in the exceptions to the stipulation. I filed an answer.

THE COURT: Well, I didn't know you had filed anything.

MR. CULBERTSON: Yes. I filed an exception to the stipulation.

(Court examines documents.)

MR. CULBERTSON: It is a separate document.

THE COURT: Here it is (examining document). What is your position on these exceptions?

MR. SEGAL: We are prepared to put on evidence supporting the statements in the stipulation.

THE COURT: All right. Let's have the evidence.

MR. SEGAL: We will call Mr. Herbig.

(Tr. 4) **George Herbig**

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Segal:

Q Will you please state your full name and address?

A George Herbig, 4628 Northwood Drive, Baltimore, Maryland.

Q What is your occupation, Mr. Herbig?

A I am an examiner in the personnel department of the B. & O. Railroad.

Q Have you brought with you the seniority roster of conductors on the Indianapolis Division of the Baltimore and Ohio Railroad?

A Yes, sir (handing).

MR. SEGAL: I would like to mark this, please.

(Thereupon a pamphlet entitled, "The Baltimore and Ohio Railroad Company, Toledo and Indianapolis Divisions, Western Region, Seniority Roster, Conductors and Trainmen," dated September 1, 1956 was marked Plaintiffs' Exhibit No. 1 for identification.)

Q I am handing you Plaintiffs' Exhibit 1, which you just handed to me, which is the Seniority Roster, Baltimore and Ohio Railroad Company, Indianapolis Division, Western Region, dated September 1, 1956.

I will ask you if that is the current and latest (Tr. 5) seniority roster for that division?

A It is; yes, sir.

Q Does that have the seniority date of C. V. Smith, the plaintiff in this case?

A Yes, it does.

Q On what page?

A On page 3.

Q And what does it show as to Mr. Smith's seniority status?

A It shows C. V. Smith was promoted to a freight conductor on August 6th, 1944.

Q Does Mr. Smith at this time have seniority as a freight conductor on the B. & O.?

MR. CULBERTSON: I will object to that. I don't think – I think that's a conclusion on his part.

THE COURT: If he is in charge of that and he knows personally, he may answer Yes or No.

Q Are you familiar with that fact?

A I can answer that this way, that this is the latest roster that was just issued September 1st, 1956, and it shows him with the freight conductor date of 8/6/44; and just recently we checked with the division and they advised us that he still retains that date.

MR. CULBERTSON: I will move that the latter part of it go out, what he checked with the division and what (Tr. 6) he learned by hearsay.

THE COURT: You may have an exception.

MR. CULBERTSON: Exception.

Q Do you know what Mr. Smith's present assignment on the B. & O. is?

A Mr. Smith is presently assigned as a regular conductor in pool number 1, and he had that job on August 6, 1956.

Q You say he was regularly assigned?

A (Nodding.)

Q Would you explain to the Court what you mean by "regularly assigned as a conductor"?

A Well, that means that his turn as a conductor has come up and he has sufficient seniority to hold a regular assignment in freight service.

Q And has he been regularly assigned?

A Our information is that he has been regularly assigned as a freight conductor since approximately June the 1st, on June the 1st, 1956.

Q What do you distinguish regular assignment from?

A Well, like I said, where the man has sufficient seniority to bid in a regular assignment or a regular run as distinguished from working incidentally as an emergency conductor or emergency service.

Q And Smith, as I understand it, is now regularly (Tr. 7) assigned as a conductor and has been since approximately June the 1st, 1956?

A Yes, sir.

Q I am directing your attention to a document that is attached to the stipulation and marked "Trainmen's Bulletin No. 82," dated August 6, 1956. Is that a copy of a B. & O. bulletin?

A Yes, sir; it is.

Q Can you tell the Court what that discloses with respect to Mr. Smith's assignment?

A This is Trainmen's Bulletin Number 82, issued by the Indianapolis Division under date of August 6, '56. It states that, "The following assignments are made as shown on Trainmen's Bulletin No. 79, dated August 1, 1956."

It shows that Conductor Smith was assigned as a conductor in pool number 1. It also shows on the bottom that prior to that time he had been assigned as a conductor on trains 95 and 96.

Q Now, there is attached to the B. & O.'s answer in this case, and also attached to the stipulation –

MR. SEGAL: Before we get into that, may we mark this copy? You have no objection to this copy, do you? Mark this copy, please, as an exhibit.

(Thereupon a Stipulation (see transcript of September 5, 1956) was marked Plaintiffs' Exhibit No. 2 for identification.)

(Tr. 8) MR. SEGAL: Your Honor, I believe I neglected to offer Exhibit 1, the roster, in evidence. I would like to offer it at this time.

THE COURT: I was going to ask if you weren't going to offer the stipulation, subject to the exceptions?

MR. SEGAL: I guess it can be done either way.

THE COURT: I think it would be better if we had it intact and offer the stipulation subject to the exceptions.

MR. SEGAL: All right. Then I won't offer Exhibit 2 either.

The roster is not in the stipulation. That's additional, and I would like to offer it.

MR. SCHNEIDER: No. This is a different roster. The roster that was just offered is a different roster than was in the stipulation.

THE COURT: All right. Separately then.

MR. CULBERTSON: Exhibit Number 1; that's what you are offering, is it not?

MR. SEGAL: Yes, sir; I would like to offer Exhibit Number 1.

THE COURT: All right; it will be received; yes.

(Thereupon the document heretofore marked Plaintiffs' Exhibit No. 1 for identification was offered and received in evidence and is made a part of this record.)

(Tr. 9) Now, directing your attention to the list of twenty-one men that is attached to the B. & O.'s answer to the amended complaint in this case, and also attached to the stipulation, I will ask you if that list was prepared under your supervision and direction?

A Yes, sir; it was.

Q And from what records was the information shown on that list obtained?

A It was taken from our files in the personnel department, and also the conductors' roster.

Q I am handing you a copy of the list, and ask you to explain to the Court just what that list discloses and what the status of those twenty-one men is.

A Charles A. Wiltison, Cumberland Division, it shows that –

Q Excuse me, Mr. Herbig. Could you explain what the list shows as to all twenty-one men, if that's possible?

A As to all twenty-one?

Q Yes.

A It shows that prior to the time that they were cited by the Brotherhood of Railroad Trainmen under their union shop agreement that they had established seniority as a conductor, that is a freight conductor.

Q Do I understand it that each of these twenty-one men shown on this list has seniority with the B. & O. as a (Tr. 10) conductor or a freight conductor?

A Yes, sir.

Q And do I understand correctly that each of the twenty-one men was cited by the Brotherhood of Trainmen for noncompliance with the Brotherhood of Trainmen's union shop agreement after he had seniority as a conductor?

A Well, I said before –

Q I mean before.

A I said prior to this time that he had established seniority as a conductor before he was cited. I am reasonably certain that that is correct in most, if not all, of the cases; although looking at this list now, some of these cases, the union shop charge two, three and four years. I see some '53 dates here. I would have to possibly check it.

Q I see. Would you say that all men whose seniority date as conductor is shown on this list as preceding 1952 had obtained seniority status, or conductor's status and seniority before citation?

A I would say that's possibly so; yes, sir.

MR. CULBERTSON: Well now, I will object to that. That is not definite and hasn't any probative value, that it's merely possible.

THE COURT: Well, how long would it take you to find out for certain?

THE WITNESS: The date they were sent in?

(Tr. 11) THE COURT: Yes.

THE WITNESS: Possibly ten or fifteen minutes.

THE COURT: Well, will we recess that long?

MR. SEGAL: I would suggest that long.

Q Do you think you can get the information definitely?

A (Nodding.)

THE COURT: We will recess for a few minutes.

(Thereupon, a short recess was taken.)

THE COURT: All right.

Q Mr. Herbig, since the recess have you ascertained from your records the date on which each of the twenty-one men listed on this list were cited by the Brotherhood of Trainmen and the date on which they were dropped pursuant to that citation?

A Would you mind repeating that, please?

MR. SCHNEIDER: You have got too much in it, Joe. Just take one at a time.

Q All right. Since the recess have you been able to ascertain from your records the date with respect to each of the twenty-one men on this list as to when they were cited by the Brotherhood for noncompliance with the union shop agreement?

A I still –

Q Don't you understand me?

(Tr. 12) A I am afraid I don't. Would you mind repeating again?

Q Have you ascertained with respect to each of these twenty-one men on the list the date on which each man was cited by the Brotherhood of Trainmen –

A Yes, sir.

Q – for noncompliance with the union shop agreement?

A Yes, sir.

MR. SEGAL: And we have entered, by agreement of counsel, the date of citation on the copy of the list attached to the stipulation.

Q Is that the correct date –

A Yes, sir.

Q – in each case?

A Yes, sir.

Q Now, you also ascertained the date – Well, I will withdraw that.

Some of the men have actually been dropped or been discharged by the B. & O. pursuant to the citation, have they not?

A Yes, sir.

Q And with respect to those of the twenty-one men who were dropped, can you ascertain the date on which they were dropped?

A Yes, sir.

(Tr. 13) MR. SEGAL: And we have written that column in under "Date Dropped" on the list attached to the stipulation.

Q And are the dates as shown there correct with respect to each man?

A Yes, sir.

THE COURT: Now, did you also show the ones that have been retained?

Q Do the men who have been retained – Does this list show which men are still in the employ of the B. & O. and have not been dropped?

A Yes, sir.

Q Which ones show that? Are those the men who have no date under the column marked "Date Dropped"?

A Yes, sir.

THE COURT: And are they members of the Conductors' Union?

MR. SEGAL: This witness doesn't know that.

THE COURT: Well, will somebody else testify to that?

MR. SEGAL: I don't think so. We don't think it's material whether they are or are not.

THE COURT: You mean as to the Smith case.

MR. SEGAL: Or as to these cases. We think that their rights depend upon whether they have been (Tr. 14) promoted to the status and seniority of conductor before the date of dropping.

THE COURT: Well, all right. Will you connect that up?

MR. SEGAL: Sir?

THE COURT: Will you connect that up, that they have been promoted to the status of conductor?

MR. SEGAL: I believe he had already testified to that.

Q Do each of the twenty-one men shown on this list have seniority and status as a conductor on the B. & O.?

A Yes, sir.

Q And does the column that is typewritten on the list headed, "Seniority Date as Conductor," what does that column show, the dates there?

A It shows their seniority as a conductor on the B. & O. on the respective division.

Q You mean it shows the date they acquired seniority as a conductor?

A The date they established seniority as a conductor on their respective division.

MR. SEGAL: No further questions.

THE COURT: Cross examination.

CROSS EXAMINATION

By Mr. Culbertson:

(Tr. 15) Q Referring to that list, Mr. Herbig, beginning with the name P. D. Davis, and all others under that name, have not been dropped, have they?

A No, sir; they have not been dropped as trainmen or as conductors.

Q And the reason is that there is a court order in a case now pending prohibiting their discharge; isn't that right?

A Yes, sir; that's correct. It prohibits their discharge as brakemen.

Q As brakemen?

A Yes, sir.

Q And therefore they retained their rights as conductors?

A As a brakeman, and also they still retain their rights as a conductor.

Q Yes. Now, there are nine men who have been dropped?

A Yes, sir.

Q And of the total of twenty-one names that appear on the list, you do not know which, if any, of those men are now members of the Order of Railroad Conductors and Brakemen or were members at the time they were cited for violation of the union shop agreement?

A No, sir; I do not.

(Tr. 16) Q In other words, you can't pick out any name on that list and say that that man is or was a member of the Order of Railroad Conductors and Brakemen?

A No, sir; I cannot.

Q Now, Mr. Segal has asked you when these men were cited by the Brotherhood of Railroad Trainmen, and you answered that the dates are listed?

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A Yes, sir.

Q Now, as a matter of fact, the Brotherhood of Railroad Trainmen doesn't cite the men at all, does it?

A Yes, sir; it does.

Q They simply notify the company that the man is in violation of the union shop agreement; isn't that it?

A Yes.

Q And then subsequent to that the railroad cites the man?

A Well, that is correct to some extent. The notice is sent us by the Brotherhood of Railroad Trainmen; and then after that we notify the employee of the advice furnished us by the Brotherhood of Railroad Trainmen.

Q There is a notification made to the railroad that the man named is in violation of the union shop agreement?

A Yes, sir. We refer to that as a cite notation.

Q And then the railroad cites the man and advises him that he will on a certain date be discharged, doesn't it? (Tr. 17) But subsequent –

A No, sir. After the Brotherhood of Railroad Trainmen initiates the proceedings under the union shop agreement and advises the company of the charge, then we in turn carry out our provisions of the union shop agreement, which is to advise the employee of the charge by the Brotherhood of Railroad Trainmen.

Q You advise him that on a certain date his services will be severed?

A That's the ultimate result, if he is in violation; yes, sir.

Q And he has the right to appeal –

A Yes, sir.

Q – from that citation?

A Yes, sir.

MR. CULBERTSON: Now, you had a bulletin there.

MR. SEGAL: It's attached to the stipulation.

MR. CULBERTSON: You referred to it, didn't you?

MR. SEGAL: I have a copy. It's also attached to the original stipulation (handing).

Q My recollection is that you testified about this bulletin, Trainmen's Bulletin No. 82, that's attached to the stipulation. You had that before you and were testifying about it?

A Yes, sir.

(Tr. 18) Q Now, my recollection is that you said that the Brotherhood of Railroad Trainmen issued this bulletin. That isn't a fact, is it?

A No, sir. I don't think I testified that way. I may have. I think I said it was a bulletin issued by the B. & O., Indianapolis Division, under date of August 6.

Q Yes. It was issued by the –

A By the company.

Q Yes. Now, this is notification to qualified men that they can bid in certain jobs; they have the right to bid on certain jobs, isn't it?

A That's right; yes, sir.

Q Now, you mentioned that the plaintiff C. V. Smith in this case under this bulletin bid in certain jobs that are in a pool?

A Yes, sir.

Q Now, the only reason why he could bid on that or was permitted to bid on it was because of a restraining order that had been previously issued by this Court; isn't that a fact?

A That's correct.

Q Otherwise he would not have been permitted to bid on that job?

A That's correct.

Q Yes. And the only reason he has that job now is (Tr. 19) because of that outstanding restraining order?

A Yes, sir.

Q In bidding on a job, an employee who is qualified to bid, he applies his seniority in so bidding, doesn't he?

A Yes, sir. Seniority is the determining factor as to whether or not he gets the job on which he bids.

Q Yes. Now –

A May I amend that. Seniority is one of the determining factors.

Q Yes. But without seniority, however, a man may not have the job; isn't that right?

A That's correct; yes, sir.

Q And now, a conductor earns his seniority that permits him to bid on a job as a conductor? He earns his seniority to become a conductor as a trainman, doesn't he?

A His employment as a trainman is a prior factor in establishing seniority as a conductor. In other words, he is promoted from brakeman to conductor.

Q By reason of his seniority as a trainman?

A By reason of his seniority as a trainman and the rules in the Trainmen's agreement.

Q If he had no seniority as a trainman, he would not be promoted to conductor, would he?

A I would say that's correct.

Q In other words, the seniority that a man has as (Tr. 20) a trainman is the substructure on which his seniority as a conductor rests, isn't it?

A That's right. That's the regular line of promotion.

Q And if his seniority as a trainman fails, his seniority as a conductor fails?

A I don't quite understand what you mean.

THE COURT: If he hasn't the seniority to entitle him to be promoted to a conductor, he wouldn't be promoted to a conductor.

MR. CULBERTSON: I know, but he might. There is no contest on that. It's a step up from a brakeman. But the point I am trying to make is this, that if he loses his seniority as a brakeman, after it has accrued to him, then he loses his seniority as a conductor if that's supporting it.

THE COURT: Well, that's the issue here.

MR. CULBERTSON: I think that's all.

THE COURT: Could I ask a question? Do we understand now that the nine that have been dropped are no longer in this case?

MR. SEGAL: No. We asked for relief, that they be –

THE COURT: That's all I wanted to know.

MR. SEGAL: –restored.

(Tr. 21) THE COURT: That's all I wanted to know, if they have seniority as a conductor.

MR. SEGAL: Yes. Our position on them is that they had acquired seniority as a conductor before the effective date of their dropping; therefore they had no right to drop them.

THE COURT: All right. Any further questions of this witness?

MR. SEGAL: I just had one or two questions.

REDIRECT EXAMINATION

By Mr. Segal:

Q When you stated that Smith was able to take this job as a regularly assigned conductor in pool number 1 as shown on the bulletin because the restraining order was in effect, what you meant – or, what did you mean by that?

MR. CULBERTSON: I object. It seems to me it's clear enough.

MR. SEGAL: It's not clear to me.

THE COURT: Well, ask what you want to know about it. I think that the objection will have to be sustained.

MR. SEGAL: Well, I think the question is worded badly anyway.

Q You testified that Mr. Smith had been regularly assigned as a conductor on trains 95 and 96 approximately (Tr. 22) June the 1st?

A Yes, sir.

Q Do you know on what date the restraining order was issued?

THE COURT: Well, tell him what date.

MR. SEGAL: It was June the 13th.

A The first one was June the 13th. Then the other one was around July the 13th or 14th.

Q All I wanted to ask you: Did the restraining order have any bearing on his assignment as a regular conductor on approximately June the 1st?

MR. CULBERTSON: I object. He is cross examining his own witness. His witness has testified.

THE COURT: Well, it's all in the record.

MR. SEGAL: I think so.

Q Now, you mentioned that seniority was one of the factors in determining whether there would be a promotion to conductor. Would you state, please, what the other factors are?

A Seniority, fitness and ability.

Q How is fitness and ability determined?

THE COURT: Well, should we go into that?

MR. SEGAL: I think he can answer it in a word.

A Well, whether or not they are qualified for it.

Q Is that determined by any type of examination?

(Tr. 23) A Yes, sir; it is.

Q Now, after a man is promoted from brakeman to conductor, does the railroad maintain separate seniority rosters as to each craft?

A Yes, sir.

MR. SEGAL: No further questions.

(Witness excused.)

THE COURT: Next witness.

MR. SEGAL: We have no further witnesses.

THE COURT: What is it?

MR. SEGAL: We have no further witnesses.

THE COURT: I see. All right.

MR. CULBERTSON: That's all. I haven't anything.

THE COURT: You have no testimony?

MR. CULBERTSON: No.

THE COURT: All right. Well now, the stipulation is in. You just put in Exhibit 1. I don't think you offered the stipulation as such.

MR. SEGAL: We offer the stipulation that was presented at the last hearing in evidence.

THE COURT: All right. You offered it then at the last hearing.

MR. SEGAL: I believe it was offered.

THE COURT: Well, if it wasn't, you can offer it again.

(Tr. 24) MR. SEGAL: Well, maybe to be safe on it, we had better offer it.

THE COURT: Yes, subject to the exceptions.

MR. SCHNEIDER: The witness had your copy of the stipulation, your Honor (handing).

THE COURT: Yes. Now, as I understand it, the twenty-one names here in the stipulation did have seniority

and status as a conductor, even though nine of them have been dropped?

MR. SEGAL: That is correct.

THE COURT: How are we going to handle this now? The restraining order was to prevent them from being dropped, but had they been dropped before—

MR. SEGAL: Yes. That's the situation. They had been dropped before this suit was filed. If your Honor will recall, it was originally filed as an individual suit—

THE COURT: Yes.

MR. SEGAL: —on behalf of Smith only, and then it was amended as a class suit to cover all others similarly situated; and the restraining order was amended, I believe by the consent of all parties, to cover all others similarly situated, whether previously dropped or threatened to be dropped in the future.

The B. & O. then filed a report of compliance with the restraining order, in which it stated these twenty-one (Tr. 25) men were, in its opinion, similarly situated, and some of them had been dropped; some of them had not been dropped.

Now, as to those that have not been dropped, we have requested the same relief as we have requested in the case of Smith.

THE COURT: Well, does this fit that, your prayer number 2: "—or continuing to deny the employment status and seniority as conductors because of their alleged failure—"

MR. SEGAL: Yes. That relates to those who are already dropped; and, as I understand the B. & O.'s report, it has ceased continuing to deny that.

I don't know what practical effect that has; but I assume if their seniority number came up as a conductor, they would be regularly assigned as a result of that.

MR. CULBERTSON: Do I understand that all the evidence is in?

MR. SEGAL: Yes.

MR. CULBERTSON: That nobody has any other evidence.

I think at this point I want to make a motion on behalf of the Brotherhood of Railroad Trainmen to dismiss because of the fact that they haven't shown any jurisdictional matter involved in this case, any matter that would give your Honor jurisdiction; and they haven't shown a case in which this Court may grant relief. And so I am making that motion at this time.

(Tr. 26) THE COURT: Well, we will let you offer your exceptions to the stipulations. But I think here that by the stipulation, plus the evidence offered this morning, that the plaintiffs have sustained the burden of proof of their amended complaint and that they are entitled to an order in accordance with their prayer.

Now, do you feel that you should file formal findings of fact and conclusions of law and a judgment entry, or is that sufficient?

MR. SEGAL: I presume it's up to Mr. Culbertson, whether he wants them.

THE COURT: No. I think it's the plaintiffs' matter at this point. It's just a question. The Court of Appeals usually wants a formal finding — separate, formal findings of fact, conclusions of law and judgment entry.

MR. SEGAL: All right.

THE COURT: Now, I am pronouncing judgment orally here, but it may be that you will want to make it more full.

MR. SEGAL: All right. We will be glad to prepare that. I think it would be the orderly way to do it.

THE COURT: I am just wondering whether or not — Did you take that other B. & O. matter to the Court of Appeals? I was just wondering if that was the one where they divided two to one sustaining the findings of fact by the Court.

(Tr. 27) MR. CULBERTSON: That is the Piggott case.

THE COURT: What is it?

MR. CULBERTSON: That is the Piggott case where they divided two to one.

THE COURT: But they sustained—

MR. CULBERTSON: This Court.

THE COURT: They sustained this Court on an order like I have just announced here; but there was some question as to whether or not the record was full. And I think by reason of that that we should have—

MR. SEGAL: A findings of fact—

THE COURT: —findings of fact, conclusions of law and separate judgment entry.

MR. CULBERTSON: That was in the Miller-Gilliece case.

THE COURT: What is it?

MR. CULBERTSON: I was in that case. That was a Pennsylvania case.

THE COURT: They didn't divide in that case.

MR. CULBERTSON: They affirmed in the Piggott case.

THE COURT: Yes.

MR. CULBERTSON: What I am wondering — I don't know whether I am clear on your Honor's order here. Are you going to make your order here to extend to each of these persons named who purport to be plaintiffs?

(Tr. 28) THE COURT: I said here that they have sustained the burden of proof of their amended and substituted complaint—

MR. CULBERTSON: Yes.

THE COURT: —and that they are entitled to an order in accordance with the full prayer.

MR. CULBERTSON: Yes.

THE COURT: And that full prayer says, among other things, "That the defendant be temporarily restrained from in any manner violating the rights of representation of the plaintiff Order of Railway Conductors and Brakemen General Committee of Adjustment for the Baltimore and Ohio Railroad for the class and craft of conductors by terminating or continuing to deny the employment status—" So that would fit these others.

MR. CULBERTSON: Well, the evidence here is there are twelve of these people now having no benefit of a court order.

THE COURT: Yes, but it's the contention of plaintiff, by acquiring the status of conductor, that these other men were entitled to be restored to their jobs.

That's your position, isn't it?

MR. SEGAL: Yes. As I understand it, the other suit, with which I am not familiar — we were not parties to it at all — applies only to their seniority as brakemen and not as conductors. Is that correct?

(Tr. 29) THE COURT: They are not pressing for that.

MR. CULBERTSON: I am not familiar with it either.

THE COURT: They are not concerned with the question of brakemen. That's out of the case.

MR. CULBERTSON: Yes.

THE COURT: It's Smith's status as a conductor. That's the question as to the status of the others, that they

are not making any claim that they are entitled to anything as trainmen. They are entitled to protection as conductors.

MR. CULBERTSON: I don't know the source of the authority to represent these men, that is for the Brotherhood to represent these men if they are not members of the Brotherhood; and there is no evidence here that any one of those twenty-one men is a member of the Brotherhood, that is Order of Railroad Conductors.

MR. SEGAL: Well, the representation, Mr. Culbertson, is by Smith.

MR. CULBERTSON: Is by Smith?

MR. SEGAL: For all parties similarly situated.

THE COURT: Well, you will furnish Mr. Culbertson a copy?

MR. SEGAL: Certainly. Now, this had been set on an application for a temporary injunction. All the answers are in, the evidence is in; and I assume that we can stipulate that it will be heard as of on final hearing.

(Tr. 30) MR. CULBERTSON: Well, yes; I assume that it is.

THE COURT: This order is on the merits and final hearing.

MR. CULBERTSON: Now, I am wondering — I am thinking about favoring myself here. I wanted to go away Friday night; be gone about ten days. I haven't had any vacation yet this year. I was going to be gone for about ten days.

Will we get this order on before, say, Friday?

MR. SEGAL: I can have it prepared. Now, it will be submitted to the B. & O.

MR. SCHNEIDER: We will have to submit it to Baltimore.

MR. CULBERTSON: I see.

THE COURT: Well, can we continue the temporary status until you come home from your vacation?

MR. CULBERTSON: I think so. I expect to be back next Tuesday a-week.

THE COURT: Well, all right.

MR. CULBERTSON: Yes, next Tuesday a-week.

THE COURT: General counsel for the Conductors' Union was so anxious to be specific that this temporary order be continued pending the—

MR. SEGAL: Yes.

THE COURT: —final preparation and acceptance (Tr. 31) of the findings of fact and conclusions of law and judgment entry—

MR. CULBERTSON: Well, I am agreeable to its continuing.

MR. SEGAL: All right.

THE COURT: You are agreeable to it?

MR. CULBERTSON: Yes.

THE COURT: All right.

MR. SEGAL: We will prepare a draft of the findings of fact and judgment, submit it to both counsel.

MR. CULBERTSON: All right. If you could do that before I go away, I would be appreciative.

MR. SEGAL: Try hard.

THE COURT: Well, do you want to take these stipulations then?

MR. SEGAL: No. I have a copy.

THE COURT: You have a copy. Well, all right; that's as far as we can go.

All right; we will recess until 2:00 o'clock.

(Thereupon, at 12:20 o'clock P.M. the hearing in the above-styled action came to a close.)

NOTICE OF APPEAL

Notice is hereby given that the Brotherhood of Railroad Trainmen, intervenor-defendant herein, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the decree granting injunctive relief entered in this action on October 3, 1956.

J. A. CULBERTSON
Attorney for appellant,
Brotherhood of Railroad Trainmen
905 First National Bank Bldg.
Cincinnati (2), Ohio
Telephone: MAin 1-2260

CERTIFICATE

J. A. CULBERTSON hereby certifies that he has served a copy of the foregoing Notice of Appeal on counsel for the respective parties herein, by depositing a copy thereof in the United States mail, properly addressed to said counsel, namely, to Philip J. Schneider, Sidney R. Prince, Joseph A. Segal and Charles A. Hastings.

J. A. CULBERTSON
Attorney for Brotherhood of
Railroad Trainmen.

THE RAILWAY LABOR ACT

* * *

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * *

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * *

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

* * *

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective

date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

* * *

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 835

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner,*

v.

CHARLES V. SMITH, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD and THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GERHARD VAN ARKEL
HENRY KAISER
Van Arkel & Kaiser
1701 K St. N. W.

J. A. CULBERTSON
905 First National Bank Bldg.
Cincinnati 2, Ohio

Counsel for Petitioner.

WAYLAND K. SULLIVAN
Assistant General Counsel
Brotherhood of Railroad Trainmen.
Cleveland 13, Ohio
Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner*,

v.

CHARLES V. SMITH, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD and THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on January 2, 1958.

CITATION TO OPINIONS BELOW

The opinion of the District Court, printed as Appendix A hereto (*infra*, p. 1a) is reported at 144 F. Supp. 869. The opinion of the Court of Appeals, printed as Appendix B hereto (*infra*, p. 8a) is reported at — F. 2d —.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1958. This petition for a writ of certiorari was filed on March [illegible], 1958, less than 90 days after entry of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Does a District Court of the United States have jurisdiction to restrain the threatened discharge of a group of employees by a railroad carrier, under a union shop agreement made pursuant to the provisions of Section Eleventh (a) of the Railway Labor Act, where such employees did not exhaust their remedies before the National Railroad Adjustment Board?

2. May a union and a railroad carrier lawfully agree that employees, engaged in trainmen service at the time a union shop agreement was entered into pursuant to Section Eleventh (a) of the Railway Labor Act, who thereafter, while engaged in dual service as trainmen and conductors, fail to maintain membership in any organization national in scope, be discharged from all employment?

3. Does subsequently acquired membership in another organization national in scope excuse a prior default under such a union shop agreement?

STATUTES INVOLVED

Pertinent provisions of the Railway Labor Act, 45 U.S.C. Secs. 152, 153, and of the Labor Management Relations Act, 29 U.S.C. Sec. 158 are set forth in Appendix C to this petition, p. 17a *infra*.

STATEMENT OF THE CASE

On June 15, 1956, the plaintiffs below and the respondents here, Charles V. Smith, an employee of the Baltimore and Ohio Railroad, and the Order of Railway Conductors and Brakemen General Committee of Adjustment for the Baltimore and Ohio Railroad (herein referred to as ORC), filed a complaint in the United States District Court for the Southern District of Ohio, Western Division, against the Baltimore and Ohio Railroad. On July 11, 1956, the Brotherhood of Railroad Trainmen, the petitioner here, (herein referred to as BRT) was allowed to intervene as a party defendant (R. 1a, 6a).

The amended and substituted complaint, filed on July 11, 1956 (R. 7a), alleged that on September 20, 1951, the Railroad, and its employees represented by the BRT, had entered into an agreement, (set forth as an appendix to the complaint (R. 9a, 15a)), pursuant to the provisions of Section Eleventh (a) of the Railway Labor Act (Appendix, p. 21a), providing that employees represented by the BRT "shall, as a condition of their continued employment subject to such agreements, become members of the Brotherhood . . . and thereafter shall maintain membership in the Brotherhood" (Section 1, R. p. 15a). The agreement further provided (Section 5 (c), R. p. 18a) that

> ". . . If the decision (of the Carrier, after hearing) . . . is that the employee has not complied with the terms of this agreement, his employment and seniority in his class or craft shall be terminated within ten (10) calendar days of the date of said decision . . ."

The complaint alleged that the plaintiff Smith held seniority as a conductor from and after August 6, 1944

(Paragraph 5, R. p. 8a); that the ORC is an organization national in scope (paragraph 6); that the plaintiff Smith is a regularly assigned conductor and a member in good standing of the ORC (paragraph 7, R. 9a); that the defendant Railroad had notified Smith that his employment and seniority as a conductor would terminate on June 14, 1956, solely because of his failure to comply with the union shop agreement with the BRT (Paragraph 8); that such discharge would constitute a violation of the Railway Labor Act, and would constitute an illegal deprivation of the right of the plaintiff ORC to represent conductors (Paragraphs 9, 10); that there were other employees similarly situated; and that the plaintiffs had no adequate remedy at law (Paragraphs 10-14). The complaint prayed a temporary and permanent injunction on behalf of the plaintiff and all others similarly situated to restrain the defendant from violating the rights of representation of the ORC and from discharging the plaintiff Smith and others similarly situated (R. 12a).

The Railroad answered, averring that the plaintiff Smith had become a member of the United Railroad Operating Crafts in April, 1952 (R. 26a); that he had ceased to be a member of the BRT on July 1, 1952, for failure to pay dues; that he had been cited for this violation on July 31, 1952; that a hearing thereon was held on September 9, 1952; that on January 6, 1955, he was notified that his employment would be terminated for violation of the agreement; that an appeal hearing was held on February 28, 1955; that because of judicial restraint, no decision was rendered until June 4, 1956, when it was determined that he was in violation of the agreement, and would be discharged on June 14, 1956 (R. 27a). It was alleged on informa-

tion and belief that Smith became a member of the ORC on April 1, 1956 (R. 26a). The answer averred that twenty others were similarly situated to Smith (R. 26a). It denied that the proposed discharges constituted violations of the Railway Labor Act (R. 28a); prayed that the court declare whether the rights of the ORC had been violated by the intended termination of employment (R. 33a); and asserted that the National Railroad Adjustment Board had exclusive primary jurisdiction of the controversy (R. 34a).

The BRT moved to dismiss on the ground that the court lacked jurisdiction (R. 35a), which motion was overruled (R. 36a). The BRT then answered, (R. 37a-43a), raising substantially the same defenses as the Railroad.

In the course of a hearing on September 6, 1956, the parties entered into a stipulation (R. 71a-76a) by which it was agreed that the ORC and the BRT are railroad labor organizations national in scope (R. 7?a-74a); that Smith had been employed by the railroad since 1929; that since August 6, 1944, he had "from time to time" served as a conductor; that on July 1, 1952, "plaintiff ceased to be a member of the BRT on account of failure to pay dues and was not at that time a member of any railroad organization qualified as 'national in scope' "; that he remained a nonmember until after he was cited on July 28, 1952 for violation of the agreement; and that he had joined the ORC on April 1, 1956 (R. 72a, 73a).

The District Court entered Findings of Fact and Conclusions of Law (R. 44a-50a), granting the relief sought (R. 5a), the judgment providing that "Nothing herein shall be construed as in any manner enjoining

the defendants . . . from terminating the employment and seniority as trainmen of the plaintiff Smith and others similarly situated" (R. 6a). The Court found that the agreement "as interpreted and applied by the parties thereto" was in violation of Section 2, Third, Fourth, Seventh, Ninth and Eleventh of the Railway Labor Act to the extent that it destroyed the employment and seniority rights of the plaintiffs as conductors (R. 43a), and that such termination of employment was "a violation, encroachment and infringement of the rights of the (ORC) to the exclusive representation of conductors . . ." on the Railroad (R. 49a). The court held that the controversy did not involve or require the interpretation of the Union Shop agreement and that the National Railroad Adjustment Board was therefore without jurisdiction (id.). It entered the injunction as prayed (R. 50a).

The BRT alone appealed. The Court of Appeals affirmed the judgment below. It held that "The instant controversy involves employees who have separate job status and separate seniority rights as both conductors and trainmen" (Appendix, p. 12a); that "the issue is whether the BRT Union Shop Agreement is valid if interpreted and carried out by the Railroad and BRT so as to deprive Smith and others similarly situated of their employment as conductors (Appendix, p. 13a); that the National Railroad Adjustment Board had no jurisdiction; that the Congress had not authorized the result sought by the BRT; that ORC has the exclusive right to negotiate with reference to conductors and had not negotiated as to this controversy; that ORC does not have a union shop contract;[1] and that as con-

[1] Though this is not explicitly set forth in the record, we believe it to be a fair inference. (See R. 83a-85a)

strued by the Railroad and the BRT the union shop agreement is plainly invalid. It read the language of Section Eleventh (a)—"as a condition of employment"—as meaning continued employment only in the craft or class covered by the agreement, and not in the employment of the employer.

REASONS FOR GRANTING THE WRIT

1. Insofar as the Court of Appeals held that the National Railroad Adjustment Board lacked exclusive primary jurisdiction, its decision is in conflict with the holding of the Court of Appeals for the Fourth Circuit in *Alabaugh* v. *Baltimore and Ohio R. R.*, 222 F. 2d 861, (1955) cert. den. 350 U. S. 839;[2] for the Second Circuit in *United Railroad Operating Crafts* v. *Wyer*, 205 F. 2d 153 (1953, aff'g 115 F. Supp. 359), cert. den. 347 U. S. 929; of a three-judge court convened in the Seventh Circuit in *Johns* v. *Baltimore and Ohio R. R.*, 118 F. Supp. 317, aff'd 347 U. S. 964; for the Seventh Circuit in *United Railroad Operating Crafts* v. *Pennsylvania R. R.*, 212 F. 2d 938 (1953); and for the Ninth Circuit in *United Railroad Operating Crafts* v. *Northern Pacific Railroad Co.*, 208 F. 2d 135, cert. den. 347 U. S. 929. We believe that it is also in conflict with two decisions by different panels of the Court of Appeals for the Sixth Circuit; *Pigott* v. *Detroit, Toledo and Ironton Railroad Co.*, 221 F. 2d 736, cert. den. 350 U. S. 833 (1955) (Judge Allen, who wrote the opinion below, dissented in *Pigott*, 221 F. 2d at page 742) and *Miller* v. *Gilliece*, 234 F. 2d 658 (1956) (though Chief Judge Simons sat in both that case and this). While these cases largely dealt with the issue whether the

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[2] See *Sampsell* v. *Baltimore and Ohio R. R.*, (C.A. 4, 1956) 235 F. 2d 569, Cert. den., 352 U.S. 941. See also *Rychlik* v. *Pennsylvania R. R.*, 229 F. 2d 171.

United Railroad Operating Crafts was or was not an organization "national in scope", this is but one application of the general rule that controversies involving Section Eleventh (a) of the Railway Labor Act are to be determined in the first instance by the National Railroad Adjustment Board.[3]

Contrary to the holding of the Court below that "The issue is not the meaning of the agreement . . ." (Appendix, p. 13a), this is precisely the question. Section 5 (c) of the agreement, cited *supra* p. 3 (R. p. 18a), states that, if it is decided that an employee has not complied with such a union shop agreement, "his employment and seniority in his class or craft shall be terminated". The Railroad and the BRT read this to mean "in his class(es) or craft(s)", where an employee had dual status at the time the agreement was made, as Smith had (R. 46a, 72a, 73a, 88a, 91a). The issue here is whether the undisputed

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[3] The courts so holding have relied on *General Committee of Locomotive Engineers* v. *Missouri, K & T R. R.*, 320 U.S. 323; *General Committee of Locomotive Engineers* v. *Southern Pacific*, 320 U.S. 338; *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561; *Slocum* v. *Delaware L. & W. R. R.*, 339 U.S. 239; *Order of Railway Conductors* v. *Southern Railway Co.*, 339 U.S. 255. The cases relied on by respondents (*Steele* v. *Louisville and Nashville R. R.*, 323 US. 192; *Tunstall* v. *Brotherhood*, 323 U.S. 210; and *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, see *Conley* v. *Gibson*, —— U.S. ——, 78 S. Ct. 99 (1957) have been distinguished on the ground that they involve "racial discrimination, as to which the courts were well qualified to grant relief and which involved none of the matters of collective bargaining which the Adjustment Board was set up to handle" *Alabaugh* v. *Baltimore and Ohio Railroad*, *supra*, at page 866. The discrimination, if any, here involved, is not, as in *Steele*, *supra*, (at page 203) "irrelevant and invidious". As in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, the rules here applied are "within the reasonable bounds of relevancy" (at page 342).

violation of the agreement by the plaintiff Smith appropriately calls for the termination of all his employment with the Railroad, or merely his employment as a trainman. This is precisely the type of problem which should, in the first instance, be submitted to the National Railroad Adjustment Board.[4] That an interpretation of the agreement is involved appears from the stipulation executed by the plaintiffs which in Paragraph 9, states that "Said union shop agreement has been *interpreted* by the defendant railroad and by the BRT to require that . . ." (R. 75a) (emphasis supplied). The Court below itself found that "*As so construed* the Union Shop agreement is invalid" (Appendix, p. 17a, (emphasis supplied).

In considering the merits of the dispute, the National Railroad Adjustment Board would have before it the facts that disciplinary action against Smith, pursuant to the agreement, had been delayed for approximately one and a half years because of an action brought in the Indiana courts (R. 54a, 74a, 86a), which period he used to acquire sufficient seniority to become a regular conductor (R. 72a, 73a); that the seniority which had enabled him to become an extra conductor and a regular conductor was acquired by virtue of his employment under the BRT agreement (R. 101a); that his retention as a regular conductor may operate to prevent the promotion of a BRT member who had throughout this period complied with the provisions of the agreement; and the entire complex of problems involved in weighing the interest in obtaining compliance with union shop agreements with fairness to employees

[4] Since the ORC is equally represented on that Board (R. 75a), the problem of fair hearing presented in *Pennsylvania Railroad Co.* v. *Rychlik*, 352 U.S. 480, is not present.

covered thereby. The Adjustment Board might well read the language of Section 5(c) of the agreement as "his employment, and his seniority in his craft or class, shall be terminated . . .". This would be consistent with the probable intention of the parties that one discharged for violation of the agreement would, upon rehire, be treated as a new employee.[8]

2. The decision of the Court of Appeals is contrary to the holding of this Court in *Pennsylvania Railroad Co.* v. *Rychlik*, 352 U. S. 480. It was there pointed out that Section Eleventh (a) did not confer on railroad employees "union shopping" rights (at page 492, fn. 29). Under the holding of that case, the plaintiff Smith was required to be a member of the BRT within sixty days of the time the union shop agreement was executed, and to retain such membership thereafter. Un-

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[8] While the agreement, in Section 8, provides that "The procedure provided for in this Section 8 shall be the sole and exclusive method for determining disputes under this agreement" (R. 20a), the Court of Appeals for the Fourth Circuit, dealing with an identical agreement, properly observed (*Alabaugh* v. *Baltimore and Ohio Railroad*, *supra*, at page 866) that

> "it is perfectly clear that the provision for the procedure prescribed by the agreement is in no sense the creation of a System Board of Adjustment . . .; and in none of the cases cited, in which the same union shop agreement was involved, does it seem to have been thought that the jurisdiction of the (National Railroad Adjustment) Board was in anywise affected by the provision. Furthermore, the provision of the agreement referred to relates to disputes between the Brotherhood and the carrier, and not to grievances of the employees against the carrier."

If the clause be held to provide a literal finality, it would of course preclude review of carrier action by the courts as well as the Adjustment Board.

doubtedly, under the final proviso to Section Eleventh (c), he had the right to "chang(e) membership from one organization to another organization admitting to membership employees of a craft or class in any of said services". But it is undisputed here that his membership in the BRT terminated on July 1, 1952, and that he did not acquire membership in the ORC or any other organization national in scope until April 1, 1956. This is not "changing membership" within the meaning of the proviso; and the Act provides no other means for escaping the obligation of a union shop agreement. The agreement, as interpreted by the parties, is therefore entirely consistent with the statutory scheme.

It is not correct to say, as the Court below did, that the BRT "ignores the further fact that ORC has the exclusive right to negotiate with reference to conductors and has not negotiated as to this controversy" (Appendix, p. 17a). The action of the Railroad and BRT in no way derogates from any rights of the ORC, which will continue to be, as it has been in the past, the sole and exclusive representative of the craft and class of conductors.[6] It is not necessary to reach the troublesome problems of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U. S. 437 (1954), or to determine whether

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[6] We do not understand the position taken by the Railroad defendant in its answer (R. p. 25a) that "the rights claimed by the plaintiff organization (ORC) are not within the jurisdiction of the National Railroad Adjustment Board". Section First, (i) (Appendix, p. 23a) provides that disputes "between an employee or group of employees and a carrier. . ." may be submitted to the Board. See, *inter alia*, *Whitehouse* v. *Illinois Central R. R. Co.*, 349 U.S. 366. The plaintiff ORC has not claimed that it could not invoke the services of the Board.

Smith's rights were "uniquely personal" (page 461), for the ORC accepted Smith's membership subject to the known and existing infirmity in his contract of employment, a defect which had matured, upon which action was suspended only because of judicial restraint. The holding of the Court below is that the interest of the BRT in full enforcement of its agreement was extinguished by Smith's adherence to ORC, in derogation of the statutory right of the BRT to be the exclusive representative of its craft.

In *Rychlik*, this Court did not rule on the question whether after-acquired membership in another organization, national in scope excuses a prior default, noting (at page 484, fn. 9) that,

> "Neither in the Court of Appeals, nor here, has Rychlik claimed that his membership in the Switchmen's Union made his discharge illegal. In both cases he stood only on his membership in UROC."

This problem has given rise to much litigation,[1] and

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[1] The following cases raising this issue are presently pending: *Walsh* v. *Pennsylvania Railroad and Brotherhood of Locomotive Engineers*, No. 962 USDC, S. D. N. Y.; *Chapman et al.* v. *Long Island Railroad et al.*, No. 3277 USDC, S. D. N. Y.; *Brubaker* v. *Baltimore and Ohio Railroad*, No. 34172 USDC, N. D. Ohio; *Lathan* v. *Baltimore and Ohio Railroad et al.*, No. 7050 USDC, W. D. N. Y.; *Hostettler et al.* v. *Brotherhood of Railroad Trainmen et al.*, No. 9795 USDC, Md.; *Decker et al.* v. *Baltimore and Ohio Railroad and Brotherhood of Railroad Trainmen*, No. 10136, USDC, Md.; *Shiels et al.* v. *Baltimore and Ohio Railroad et al.*, No. 12172, USCA 7 (see opinion below at 154 F. Supp. 917). See also *Alabaugh* v. *Baltimore and Ohio Railroad et al.*, 222 F. 2d 861, at page 863; 125 F. Supp. 401 at 410 (attempted reaffiliation after default), *Shiels et al.* v. *Baltimore and Ohio R. R.*, 154 F. Supp. 917 at 921; *Rychlik* v. *BRT*, 128 F. Supp. 449, at 456; *McNamar* v. *B & O Chicago Terminal Co.*, 153 F. Supp. 835.

should be authoritatively decided, either on the merits, or by a holding that the National Railroad Adjustment Board has exclusive primary jurisdiction.[8]

The problem is an important one in the administration of the Railway Labor Act. As the many cases already filed show, many persons who failed to retain membership in an organization national in scope have sought to excuse their default by later joining the same, or another, organization national in scope. Since this question has not been authoritatively resolved, the administration of union shop agreements, and the

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[8] The National Labor Relations Board has taken the broad position that a belated tender of dues or initiation fees under a union shop agreement cures a previous default; *re Aluminum Workers International Union*, 112 NLRB 619, at 621 (1955), *NLRB* v. *Aluminum Workers*, 230 F. 2d 515 (CA 7, 1956). The broad rule adopted by the NLRB was rejected by the Second Court of Appeals in *International Association of Machinists* v. *NLRB*, 247 F. 2d 414 (1957) and the Ninth Court of Appeals in *NLRB* v. *Technicolor Motion Picture Corp et al.*, 248 F. 2d 348 (1957). In the *IAM* case, the Second Court of Appeals, at page 420, and in the *Technicolor* case, the Ninth Court of Appeals, at page 354, pointed to the industrial instability which would necessarily follow if the rule laid down by the NLRB were adopted. While Section Eleventh (a) is "substantially the same" as the 1947 union shop amendments to the NLRA (S. Rep. No. 2262, 81st Cong. 2nd Sess. p. 3, U. S. Code Cong. Serv. 81st Cong. 2nd Sess. 1950. V. 2, pp. 4319, 4321), these cases deal with different statutory language, with a different legislative background in non-railroad industries. cf. Sections 8 (a) (3) and 8 (b) (2) of the Labor Management Relations Act (Appendix, p. 17a) (Act of June 23, 1947, c. 120, Title 1, Sec. 101, 61 Stat. 140; 29 U. S. C. A. sec. 158) with Section Eleventh (a) (Appendix, p. 21a); and see, as to the legislative history of Section Eleventh (a) on this matter, Hearings, Subcommittee of Senate Committee on Labor and Public Welfare, 81st Cong. 2d Sess., p. 23, on S. 3295; Hearings, House Comm. on Interstate and Foreign Commerce, 81st Cong. 2d Sess., p. 24 on H. R. 7789. It is therefore the more appropriate that a similar problem in the railroad field should be first considered by the Adjustment Board.

rights of unions and employees thereunder, are uncertain and clouded. Resolution of the controversy would settle many disputes which have arisen, and which may arise, under the Railway Labor Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

GERHARD VAN ARKEL
HENRY KAISER
Van Arkel & Kaiser
1701 K St. N. W.
Washington 6, D. C.

J. A. CULBERTSON
905 First National Bank Bldg.
Cincinnati 2, Ohio

Counsel for Petitioner.

WAYLAND K. SULLIVAN
Assistant General Counsel
Brotherhood of Railroad Trainmen.
Cleveland 13, Ohio
Counsel for Petitioner
Brotherhood of Railroad Trainmen.

APPENDIX A

Civ. A. No. 3804

CHARLES V. SMITH, and Order of Railway Conductors and Brakemen General Committee of Adjustment for the Baltimore and Ohio Railroad, *Plaintiffs*,

v.

The BALTIMORE AND OHIO RAILROAD COMPANY, A Maryland corporation, *Defendant*,

and

BROTHERHOOD OF RAILROAD TRAINMEN, *Intervenor-Defendant*.

United States District Court, S. D. Ohio, W. D. Oct. 3, 1956.

DRUFFEL, District Judge.

1. The plaintiff, Charles V. Smith, is a resident of Hamilton County, Ohio, and is a citizen of the State of Ohio.

2. The plaintiff, Order of Railway Conductors and Brakemen General Committee of Adjustment for The Baltimore and Ohio Railroad (hereinafter called "the Conductors"), is a voluntary, unincorporated association with its principal place of business located in Cincinnati, Hamilton County, Ohio.

3. The defendant, The Baltimore and Ohio Railroad Company (hereinafter called "the B. & O."), is a Maryland corporation authorized to do business in Ohio, and is a common carrier within the provisions of the Railway Labor Act, as amended, 45 U.S.C.A. § 151 et seq.

4. The intervenor-defendant, Brotherhood of Railroad Trainmen (hereinafter called "the Trainmen"), is a voluntary, unincorporated association with its principal place of business located at Cleveland, Cuyahoga County, Ohio.

5. This is an action for injunction brought by the Conductors and by Charles V. Smith for himself and others similarly situated against the B. & O. The Trainmen intervened as a party defendant. The amount in controversy with respect to the plaintiff Smith and with respect to each of the parties he purports to represent exceeds, exclusive of interest and costs, the sum of $3,000. The action involves and requires a determination of the validity of a union shop agreement negotiated under the provisions of the Railway Labor Act between the B & O. and the Trainmen interpreted and applied by the parties thereto. This court has jurisdiction of the parties to this cause and the subject matter thereof because this is a suit arising under a law of the United States regulating commerce, the Railway Labor Act, Title 45 U.S.C.A. § 151 et seq. and under Section 2201 of the Judicial Code, 28 U.S.C.A. §§ 1337, 2201.

6. The plaintiff Smith is and has been since 1929 an employee of the B. & O. He was promoted to a conductor on August 6, 1944, and holds seniority as a conductor from and after such date. Since June 1, 1956, he has been employed by the B. & O. as a regularly assigned conductor, and since that date his assignments have all been those of a regularly assigned conductor.

7. The Conductors is a labor organization, national in scope, organized in accordance with the provisions of the Railway Labor Act. It has been the exclusive bargaining representative of the class and craft of conductors on the defendant's railroad for many years and is presently certified under date of January 13, 1945, as the bargaining representative of the class and craft of conductors on said railroad, pursuant to Section 2 of the Railway Labor act, 45 U.S.C.A. § 152, and is acting as representative of said class and craft of conductors on the properties of the B. & O. pursuant to a collective bargaining agreement effective September 1, 1927, as amended, providing rates of pay, rules and working conditions for the said class and craft of conductors.

8. The Trainmen is a labor organization, national in scope, organized in accordance with the Railway Labor Act. It has been the exclusive bargaining representative of the class and craft of yard helpers, yard foremen, passenger and freight brakemen and flagmen, and switchtenders (hereinafter collectively called "trainmen"), for many years. Many of the employees heretofore represented by the Trainmen have been promoted to, have worked as and hold seniority as conductors.

9. Acting under the provisions of Section 2, Eleventh, of the Railway Labor Act, as amended, 45 U.S.C.A. § 152, Eleventh, the B. & O. and the Trainmen entered into a Union Shop Agreement dated September 20, 1951, which has been effective since October 1, 1951. A copy of such agreement (hereinafter called "the Trainmen's Union Shop Agreement"), is attached to the Complaint as Exhibit "A".

10. On July 1, 1952, the plaintiff Smith, who had theretofore been a member of the Trainmen, ceased to be a member of that organization on account of failure to pay dues and was not at that time a member of any railroad labor organization "national in scope". He did not become a member of any railroad labor organization "national in scope" until after he was cited on July 28, 1952, for violation of the Trainmen's Union Shop Agreement. He became a member of the Conductors on April 1, 1956, and has remained a member of the Conductors since that date.

11. On July 28, 1952, the Trainmen notified the B. & O. that the plaintiff Smith was in violation of the Trainmen's Union Shop Agreement; plaintiff Smith was cited for this violation by the B. & O. on July 31, 1952; plaintiff Smith requested a hearing of the union shop charge on August 12, 1952; such a hearing was held on September 9, 1952; the decision in the case of plaintiff Smith was rendered on January 6, 1955, when the B. & O. notified him that his employment relationship would be terminated effective

January 17, 1955; that on January 12, 1955, plaintiff Smith requested an appeal hearing, which, pursuant to notice of February 17, 1955, was duly held on February 28, 1955, and, on June 4, 1956, it was determined by the B. & O. that plaintiff Smith was in violation of the Trainmen's Union Shop Agreement between the B. & O. and the Trainmen; and, accordingly, he was notified on that date that his employment relationship with the B. & O. would be terminated June 14, 1956, on account of failure to comply with the terms of the Trainmen's Union Shop Agreement.

12. The 20 other conductors named on the list attached to the Stipulation filed herein are similarly situated to the plaintiff Smith. Each of them was promoted to a conductor with the B. & O. on the date opposite his name under the heading "Seniority" as a conductor from and after said date. The Trainmen notified the B. & O. that each of said 20 conductors was in violation of the Trainmen's Union Shop Agreement on the date set forth opposite his name under the heading "Date Cited". The B. & O. has notified each of the first 9 conductors on the list that because of his failure to comply with the Trainmen's Union Shop Agreement his employment relationship with the B. & O. would cease on the date set forth opposite his name under the heading "Date Dropped". The B. & O. has not as yet terminated the employment relationship of the last 11 conductors on the list but will do so unless restrained by this Court.

13. The Trainmen's Union Shop Agreement has been construed and acted upon by the parties thereto, being the defendants herein, to require that an employee in violation thereof shall be discharged as an employee and thereby deprived of his status and seniority not only as a trainman but also as a conductor, and the Trainmen have demanded that the B. & O., in accordance with the construction of the parties thereto, not only terminate the employment and seniority as trainmen of plaintiff Smith and others simi-

larly situated because of their noncompliance with the said Trainmen's Union Shop Agreement, but that the B. & O. also terminate their employment and seniority as conductors because of such noncompliance; and unless restrained by this court the B. & O. will acquiesce in said demand of the Trainmen and will, because of such noncompliance with the Trainmen's Union Shop Agreement, deprive and continue to deprive the plaintiff Smith and other conductors similarly situated of their employment and seniority as conductors.

14. The plaintiffs do not claim any right or relief with respect to the employment or seniority status of the plaintiff Smith or of others similarly situated as members of the class and craft of trainmen but only with respect to the employment and seniority status of the said individuals as members of the class and craft of conductors.

CONCLUSIONS OF LAW

[1] 1. This action arises under the laws of the United States regulating commerce and more particularly under the railway Labor Act, as amended, Title 45 U.S.C.A. § 151 et seq., and the case is, therefore, within the jurisdiction of the court under Title 28 U.S.C.A. § 1337. Jurisdiction is also founded upon diversity of citizenship under Title 28 U.S.C.A. § 1332. This court has jurisdiction of the subject matter of this action and of the parties thereto.

[2] 2. The action is properly brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, 28 U.S.C.A. on behalf of conductors similarly situated to the plaintiff Smith.

[3] 3. The Union Shop Agreement between the B. & O. and the Trainmen as interpreted and applied by the parties thereto is invalid and in violation of the Railway Labor Act, as amended, and particularly Section 2, Third, Fourth, Seventh, Ninth and Eleventh thereof, to the extent that said agreement destroys the employment and seniority

rights of Smith and others similarly situated as conductors and as members of the craft and class of conductors.

4. The termination of the employment and seniority rights as conductors of the plaintiff Smith and others similarly situated because of their noncompliance with the Union Shop Agreement between the Trainmen and the B. & O. Railroad is unlawful under the Railway Labor Act, as amended, and particularly Section 2, Third, Fourth, Seventh, Ninth and Eleventh thereof.

5. The termination of the employment and seniority as conductors of the plaintiff Smith and others similarly situated is a violation, encroachment and infringement of the rights of the Conductors to the exclusive representation of the class and craft of conductors on the B. & O. under the provisions of the Railway Labor Act, as amended, and particularly Section 2, Third, Fourth, Seventh, Ninth and Eleventh thereof.

6. Insofar as such discharges will terminate the employment status and seniority as trainmen of the plaintiff Smith and others similarly situated, the plaintiffs do not seek and are not entitled to relief with respect thereto.

[4] 7. The controversy in this case does not involve or require the interpretation of the Trainmen's Union Shop Agreement inasmuch as there is no dispute between the Trainmen and the B. & O. Railroad, the only parties to the agreement, as to its interpretation or application. The National Railroad Adjustment Board is therefore without jurisdiction and plaintiff and others similarly situated are without an adequate administrative remedy. Unless this court acts, the employment and seniority rights as conductors of Smith and others similarly situated will be terminated and destroyed, and this court has jurisdiction and power to grant injunctive relief.

8. The Conductors, as a railway labor organization, likewise do not have any administrative remedy available to

them under the procedures provided by the Railway Labor Act as the bargaining representative of the class and craft of conductors on the defendant's railroad, which rights the defendants have violated and are threatening to violate, and this court has jurisdiction and power to grant injunctive relief to protect the rights of representation of said organization.

9. Plaintiffs are entitled to a permanent injunction against the B. & O., as prayed for in the Amended and Substituted Complaint, and to a permanent injunction against the Trainmen restraining it from taking any action to require termination by the B. & O., of the employment and seniority as conductors of the plaintiff Smith and those similarly situated.

It is ordered, adjudged and decreed:

1. That the defendants, the Baltimore & Ohio Railroad Company and the Brotherhood of Railroad Trainmen, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them, be and they are hereby restrained and enjoined from terminating or taking any action to require the termination of the employment status and seniority of the plaintiff Charles V. Smith and all other employees similarly situated as conductors because of their failure to comply with the Union Shop Agreement between the defendants dated September 20, 1951, and are further restrained and enjoined from continuing to deny the employment status and seniority as conductors of any employees similarly situated to said plaintiff Charles V. Smith whose employment status and seniority as conductors has been heretofore terminated because of noncompliance with said Union Shop Agreement.

2. Nothing herein shall be construed as in any manner enjoining the defendants, the Baltimore & Ohio Railroad Company and the Brotherhood of Railroad Trainmen, from terminating the employment and seniority as trainmen of

the plaintiff Smith and other employees similarly situated or as enjoining the defendants from in any way taking any action to compel or require the termination of their employment and seniority as trainmen.

3. The costs of this action are taxed to the defendants.

The defendant, Brotherhood of Railroad Trainmen, excepts.

APPENDIX B

No. 13069

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*,

v.

CHARLES V. SMITH, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD and THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation, *Appellees*.

Appeal from the United States District Court,
Southern District of Ohio, Western Division

Decided January 2, 1958

Before SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

ALLEN, Circuit Judge. This appeal arises out of an action praying for an injunction against defendant The Baltimore and Ohio Railroad, hereinafter called the Railroad, on behalf of plaintiff Smith and others similarly situated. The case arises out of the following facts which, for the most part, are stipulated:

Smith had been employed as a trainman on the Railroad since 1929, and was a member of the Brotherhood of Rail-

road Trainmen, a voluntary labor association, hereinafter called BRT. Pursuant to the Railway Labor Act as amended, 45 U. S. C., Section 152, Eleventh, BRT negotiated a Union Shop Agreement with the Railroad effective October 1, 1951, to date. On August 6, 1944, Smith was promoted to the status of conductor on the Railroad. Thereafter he performed dual service in the capacity of both trainman and conductor, but at the time this case was filed he was regularly assigned as conductor. The Order of Railway Conductors and Brakemen, joint plaintiff, hereinafter called ORC, an organization of national scope organized under the Railway Labor Act, did not have a union shop agreement with the Railroad, but since 1927 it had been the exclusive representative of all men employed by the Railroad of the craft and class of conductors, being their certified bargaining representative. Smith, under the collective bargaining contract between ORC and the Railroad, started to acquire seniority rights as a conductor at the time of his promotion on August 6, 1944. July 1, 1952, Smith ceased to maintain his membership in BRT, and was cited by BRT July 28, 1952, for noncompliance with the Union Shop Agreement. After the usual administrative proceedings decision was rendered against Smith June 4, 1956. It was determined that Smith had violated the Union Shop Agreement between BRT and the Railroad, and Smith was notified by the Railroad that his employment would be terminated June 14, 1956. Twenty other employees, some of them residing outside the Circuit, who have performed dual service with the Railroad as both trainmen and conductors, are subject to discharge because of noncompliance with the BRT Union Shop Agreement, nine of them having been so notified. The complaint prays for relief for Smith and for all other employees of the Railroad similarly situated belonging to the craft and class of conductors represented by ORC, and for permanent injunction.

The District Court granted the injunction. It held that the Union Shop Agreement between the Railroad and BRT, as interpreted and applied by the parties, is invalid and in violation of the Railway Labor Act as amended, particularly Section 2, Third, Fourth, Seventh, Ninth and Eleventh, to the extent that the agreement destroys the employment and seniority rights of Smith and others similarly situated as conductors and as members of the craft and class of conductors.[1] It held that the termination of the employment and seniority rights as conductors, of the plaintiff and others similarly situated, because of noncompliance with the Union Shop Agreement between the BRT and the Railroad, is unlawful under the Railway Labor Act as amended. It held that the controversy does not in-

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[1] RAILWAY LABOR ACT—45 U. S. C. § 152.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. . . . it shall be unlawful for any carrier to interfere in any way with the organization of its employees. . . .

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed. . . .

Eleventh. . . . any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees . . . shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: . . .

* * * * * *

(c) The requirement of membership in a labor organization . . . shall be satisfied . . . if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services: . . . Provided, . . . That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

volve or require the interpretation of the trainmen's Union Shop Agreement, inasmuch as there is no dispute between the parties to the agreement, the trainmen and the Railroad, as to its interpretation or application; that the National Railroad Adjustment Board therefore has no jurisdiction under Section 152, Ninth, and that plaintiff and others similarly situated are without an adequate administrative remedy. It also held that the ORC has no administrative remedy available under the Railway Labor Act, as the bargaining representative of the craft and class of conductors. It specifically held that, in so far as the discharges contemplated will terminate the employment and seniority as trainmen of plaintiff and others similarly situated, plaintiffs neither seek nor are entitled to relief with respect thereto. A permanent injunction was granted against the Railroad restraining it from terminating or taking any action to terminate the employment status and seniority of Smith and all other employees similarly situated as conductors because of their noncompliance with the Union Shop Agreement. A permanent injunction was issued against BRT restraining it from taking action to require termination by the Railroad of the employment and seniority as conductors of plaintiff and those similarly situated.

The Railroad did not appeal from the judgment and only the BRT, which had been allowed to intervene as party defendant, contests it in this court. It was agreed by the parties that under usual railroad procedures the employees had dual but separate job status and seniority, both as conductors and trainmen. It was stipulated that the ORC is the exclusive bargaining representative of the craft and class of conductors and that the BRT is the exclusive representative of the trainmen.

The controversy presented arose out of the fact that in 1952, after the Union Shop Agreement had been consummated between the Railroad and BRT, Smith and others

failed to pay dues to BRT. In accordance with the Union Shop Agreement, BRT then demanded that the employment status and seniority of these men be terminated. However, it demanded their discharge not only as trainmen but as conductors. The Railroad declares that it will terminate Smith's employment unless restrained and that this action will necessarily terminate Smith's employment and seniority as conductor as well as trainman.

The case thus presents a different problem from that of *Pennsylvania Railroad Company* v. *Rychlik*, 352 U. S. 480, and *Pigott* v. *Detroit, Toledo and Ironton Railroad Company*, 221 Fed. (2d) 736 (C. A. 6). These cases involved suits by employees who had been discharged for noncompliance with a union shop contract, where the employees held jobs only in the same craft or class represented by the union. The instant controversy involves employees who have separate job status and separate seniority rights as both conductors and trainmen. We have one union seeking to enforce its union shop contract, not only against its own members, but against members of another union which has exclusive jurisdiction over the conductor relationship.

BRT urges that the case is not within the jurisdiction of the courts but must be handled exclusively by the National Railroad Adjustment Board. We think the District Court decided this question correctly. Since the controversy arises under the laws of the United States, 45 U. S. C., Section 151 et seq, the case is within the jurisdiction of the District Court, 28 U. S. C., Sections 1332 and 1337, unless under the Railway Labor Act jurisdiction is vested in one of the administrative boards.

BRT, relying upon adjudications which involve the interpretation of collective bargaining agreements and upon cases which cover jurisdictional disputes between separate unions, urges that the decision upon this point was reversible error.

While in such controversies the National Railroad Adjustment Board has exclusive jurisdiction (*Slocum* v. *Delaware, Lackawanna & Western Railroad Company*, 339 U. S. 239), the decisions relating to the validity of railway labor agreements hold that the administrative remedy is not available. Here there is no question as to the interpretation of the Union Shop Agreement such as was present in the *Slocum* case, *supra*. The issue is not the meaning of the agreement which, in fact, is plain in its provisions and effect. The validity of the Union Shop Agreement as between BRT, the Railroad and the trainmen is not questioned. The issue is whether the BRT Union Shop Agreement is valid if interpreted and carried out by the Railroad and BRT so as to deprive Smith and others similarly situated of their employment as conductors. Decision of this issue depends upon the meaning of the statute and over such a question the federal courts have jurisdiction. In *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768, the Supreme Court held that when a contract between the union and the railroad produced an illegal result the courts, and not the National Railroad Adjustment Board, had jurisdiction.

As found by the District Court, the BRT is the exclusive bargaining representative of the craft and class of yard helpers, yard foremen, passenger and freight brakemen and flagmen, and switch tenders, collectively called "trainmen." While many employees represented by BRT have been employed as, worked as, and held seniority as conductors, the bargaining contract between BRT and the Railroad in no way purports to cover the craft and class of conductors. The construction sought by the Railroad and the BRT would enforce an unambiguous contract contrary to its plain purport, in violation of Section 2, Eleventh (a), of the Railway Labor Act. Cf. *W. P. Brown & Sons Lumber Company* v. *Louisville & Nashville Railroad Company*, 299 U. S. 393, 397-8. Since the issue is the validity and not the meaning of the contract, the court has

jurisdiction. *W. H. Mount* v. *The Grand International Brotherhood of Locomotive Engineers*, 226 Fed. (2d) 604, 607 (C. A. 6), certiorari denied 350 U. S. 967.

BRT'S further contention that this case is similar to a jurisdictional dispute and hence falls within the administrative procedures of the Railway Labor Act is likewise without merit. Here there is no "asserted overlapping of the interests of two crafts." *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 320 U. S. 323, 334. BRT and ORC are not asserting any claim to jurisdiction over the same jobs or working positions, nor is there the slightest dispute as to the organization representing the employees concerned. The question posed is whether, under the Railway Labor Act, which authorizes a union shop agreement between a labor organization and a railroad as to the "craft or class" represented by the labor organization, action can be taken cutting off seniority rights of employees in a different craft or class covered by a separate bargaining agreement and securing their discharge as to both types of employment. The administrative boards set up under the Act have no jurisdiction to determine such a question. *Steele* v. *Louisville & Nashville Railroad Company*, 323 U. S. 192, 204, 205. While the instant case is factually different from the *Steele* case, *supra*, the principle declared is controlling. The Supreme Court there stated "There is no question here of who is entitled to represent the craft, or who are the members of it. . . ." "Nor are there differences as to the interpretation of the contract. . . ." It was there held that the court had jurisdiction in cases under the Railway Labor Act which involve a violation of the Act and the validity of an agreement under the Act.

BRT also contends that the court should not have granted injunctive relief. Since the plaintiffs, as conceded by the Railroad, have no administrative remedy and the facts are

stipulated, the injunction should be sustained if the plaintiffs have a cause of action. As to the impropriety of the injunction much of BRT's argument is eliminated by the fact that the relief is prayed for only as to the rights of Smith and others as conductors and the court specifically limited the relief granted to such rights.

The fact that Smith and others in the same situation performing dual functions in separate crafts and classes of the Railroad failed to pay dues to BRT in 1952 and were cited for this noncompliance prior to the filing of this case clearly has no bearing upon the question whether they should be dismissed from employment as conductors in 1956, when they are members of the OBC, a labor organization national in scope organized under the Act, which has been and is the exclusive bargaining representative of the conductors.

Smith was employed as a conductor in 1944, eight years before he was cited by BRT and twelve years before his proposed discharge as a conductor. Under the OBC bargaining agreement Smith's rights as a conductor were established and accrued "from date of promotion." Rule 3, OBC agreement. Smith was assigned regularly as a conductor at the time of hearing but this, we think, is not decisive. The controlling consideration is that Smith's rights as a conductor and the rights of others similarly situated have been long established and are sought to be destroyed by the action of a labor union which has no bargaining rights affecting conductors. The question is whether these facts constitute a cause of action entitling plaintiffs to relief.

In urging that the injunction should have been denied BRT relies principally upon the proposition that under 45 U. S. C., Section 152, Eleventh (a), the carrier and the union are authorized to make agreements "requiring as a condition of continued employment," that within a stated period "all employees shall become members of the labor

organization representing their craft or class. . . ." The statutory phrase "as a condition of continued employment" is written into the Union Shop Agreement. BRT argues that if the present injunction is permitted to stand Smith and those similarly situated will have continued employment with the Railroad in spite of their noncompliance with the BRT Union Shop Agreement. Section 152, however, requires the union to be the representative "of the craft or class" of the employees who have designatd it. Nothing in the statute permits one union to represent employees of a craft or class for which the union is not designated as representative. The result contended for is that a union whose union shop contract has been violated may deprive Smith and others not only of their seniority rights and employment in that union but also of seniority rights and employment covered by a union contract which Smith and others have not violated. In fact, ORC declares that Smith is a member in good standing with its organization and ORC appears as coplaintiff in this action opposing Smith's discharge as a conductor. Reading the phrase "as a condition of continued employment" in the context of the entire statute we think Congress did not contemplate nor authorize the result sought by BRT. Since Smith seeks protection only as a conductor, it is sufficient that when this action was filed he had already joined ORC.

In the light of the whole enactment we think the phrase "continued employment" means continued employment in the craft or class covered by the BRT contract, that is, in the trainmen, and that the phrase has no reference to employment in a totally different craft or class such as that of the conductors even though the employer is the same.

If a union shop agreement is to have the effect contended for by BRT the statute should so provide. Such a purpose should not be read into the Railway Labor Act by implicaiton. If such a drastic penalty for noncompliance with the union shop agreement of one craft or class

is to be held valid and enforceable as to any and every other craft or class of railroad employees, the penalty should be based upon an express enactment of the Congress.

BRT's contention ignores the fact that BRT cannot legally negotiate with reference to conductors, and yet it has negotiated with the Railroad as to these conductors' rights. It ignores the further fact that ORC has the exclusive right to negotiate with reference to conductors and has not negotiated as to this controversy. It ignores the fact that ORC does not have a union shop contract with the Railroad and that Smith and others similarly situated have not violated the ORC contract. It asks that this court strike out material provisions from the statute and substitute material provisions not in the statute. As so construed the Union Shop Agreement is plainly invalid and the action contemplated thereunder by BRT and the Railroad is illegal. It follows that a valid cause of action is stated and the District Court rightly granted the injunction.

The judgment is affirmed.

APPENDIX C

Relevant Statutory Provisions

29 United States Code, 158(a)(3), (b)(2) (61 Stat. 140) provides as follows:

> § 158(a) It shall be an unfair labor practice for an employer— . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States,

shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

§ 158(b) It shall be an unfair labor practice for a labor organization or its agents— . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsec-

tion (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

45 United States Code 152, 153 (48 Stat. 1186, 1189, 64 Stat. 1238) provide in part as follows:

§ 152: "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective baragining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any

labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such

manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employes to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in

scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended."

§ 153, First (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 835

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner*,

v.

CHARLES V. SMITH, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD and THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation, *Respondents*.

REPLY OF PETITIONER TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GERHARD VAN ARKEL
HENRY KAISER
Van Arkel & Kaiser
1701 K St. N. W.
Washington 6, D. C.

J. A. CULBERTSON
905 First National Bank Bldg.
Cincinnati 2, Ohio

Counsel for Petitioner.

WAYLAND K. SULLIVAN
Assistant General Counsel
Brotherhood of Railroad Trainmen.
Cleveland 13, Ohio
Counsel for Petitioner

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REPLY OF PETITIONER TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents' Opposition to the Petition merits, we feel, this brief reply.

1. The respondents do not attempt to deny the existence of a conflict among the Courts of Appeal pointed out at pages 7 to 10 of the Petition.

2. The respondents argue (Opposition, p. 5) that "if the BRT union shop agreement purported to apply to

conductors, it would be clearly invalid in this respect under the Railway Labor Act . . .". No such contention has been made. The petitioner argues only that the agreement applied to Smith. Section 2, Eleventh (c) of the Railway Labor Act (Petition, Appendix C, p. 23a) specifically provides that

> ". . . an employee . . . as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him."

Smith was a member of the craft represented by the BRT "on the effective date of the first agreement applicable to him" (Petition, p. 8). His obligation to remain a member of the BRT could thereafter be relieved only pursuant to the proviso to Section Eleventh (c), by "changing membership from one organization to another organization". This, as we pointed out (Petition, p. 11), he did not do.

3. Respondents argue (Opposition p. 7) that "The issue in this case, unlike that in the *Rychlik* case, does not involve the claim that an alternative union membership prevented the discharge of the individual respondents as trainmen". The addition of the words "as trainmen" is gratuitous. The respondents do assert that the belated acquisition of membership in the ORC was sufficient to cure the undisputed violation of the BRT agreement, and to confer upon Smith an immunity for his default. Manifestly, there will be little respect for union shop agreements if those covered by them are entitled to disregard them, as here, from July 1, 1952 to April 1, 1956, by the simple device of then seeking the shelter of another organi-

zation. Respondents' contention would be equally applicable had Smith joined any organization "national in scope", whether ORC or some other.

4. Respondents make no effort to deny the importance of the question here presented in the administration of the Railway Labor Act, pointed out at pp. 12-14 of the Petition.

Respectfully submitted,

GERHARD VAN ARKEL
HENRY KAISER
Van Arkel & Kaiser
1701 K St. N. W.
Washington 6, D. C.

J. A. CULBERTSON
905 First National Bank Bldg.
Cincinnati 2, Ohio
Counsel for Petitioner.

WAYLAND K. SULLIVAN
Assistant General Counsel
Brotherhood of Railroad Trainmen.
Cleveland 13, Ohio
Counsel for Petitioner

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 835

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner*,

v.

CHARLES V. SMITH, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD and THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation, *Respondents*.

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES A. HASTINGS
V. C. SHUTTLEWORTH
HARRY E. WILMARTH
1120 Merchants National Bank Bldg.
Cedar Rapids, Iowa

JOSEPH A. SEGAL
DAVID W. GOLDMAN
1616 Union Central Bldg.
Cincinnati 2, Ohio

Counsel for Respondents,
Charles V. Smith and Order of Railway Conductors and Brakemen, General Committee of Adjustment for The Baltimore and Ohio Railroad.

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BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 251 F. 2d 282. No petition for rehearing was presented to that court. The opinion of the District Court is reported at 144 F. Supp. 869. The opinions of the courts below are set forth in the Appendix to the Petition for Writ of Certiorari (App. pp. 1a, 8a).[1]

[1] References to the Petition for Writ of Certiorari will be cited as "Petition" and to the Appendix thereto as "App." References to Appellant's Appendix Record and Appellees' Appendix Record in the Court of Appeals will be cited as "R." and "S. R.", respectively.

QUESTIONS PRESENTED

The questions presented by the petitioner fail to express the issues in the terms and circumstances of the case and the record evidence. With respect for the entire record the questions presented are:

1. Does a District Court of the United States have jurisdiction of a suit involving the validity of a union shop contract under the Railway Labor Act, no question of meaning or interpretation of such contract being presented?

2. Does the Railway Labor Act authorize a railway labor union and a railroad carrier to enter into a union shop contract, the violation of which not only would require the termination of the employment and seniority of an employee in the class and craft represented by the contracting union but would also require the termination of the employment and seniority rights held by such employee in another class and craft exclusively represented by another railway labor organization?

STATEMENT OF THE CASE

Petitioner's statement of the case contains matters drawn from allegations in the pleadings of the parties but which were not established by evidence. The facts for the most part were stipulated by the parties (R. 71a-88a; S. R. 1b-2b) or were established by oral testimony (R. 89a-104a).[2] The District Court based its findings on the stipulation and oral testimony. The Court of Appeals adopted the findings of the District Court. We

[2] The Stipulation of the parties, while unsigned by the petitioner, was agreed to by it with the exception of paragraphs 4 and 5. See Exceptions to Stipulation of BRT (S. R. 1b). The facts stated in paragraphs 4 and 5 of the Stipulation were established by testimony (R. 89a-104a).

therefore deem it essential to set forth the material facts concurred in by the courts below.

The respondent Charles V. Smith was employed by The Baltimore & Ohio Railroad (herein referred to as "B & O") as a brakeman in 1929 (R. 72a; App. 2a). He was promoted to the craft of conductor on August 6, 1944, and after such date held and acquired seniority as a conductor under the collective bargaining agreement negotiated by the respondent Order of Railway Conductors & Brakemen (herein referred to as "ORC") as the exclusive bargaining representative of the class and craft of conductors on the B & O (R. 72a, 73a; App. 2a). Smith was employed in service as a regularly assigned conductor at the time of his proposed discharge in 1956 from all employment on the B & O for an alleged failure to comply with the terms of the union shop contract of the petitioner (herein referred to as "BRT") while he was working as a brakeman in 1952 (R. 72a-74a; App. 2a-4a). The ORC contract does not contain a union shop agreement. (App. 9a).

The union shop agreement between the B & O and the BRT, as the exclusive bargaining representative for the class and craft of trainmen,[3] was construed and acted upon by the parties thereto as requiring the discharge of any employee determined to be in violation thereof not only as a trainman but also as requiring that such employee be deprived of his employment and seniority rights *as a conductor* (R. 75a; App. 4a-5a). The BRT demanded that the B & O terminate the employment and seniority rights of the respondent Smith and others similarly situated *as conductors and as members of the*

[3] The term "trainmen" is a general classification that covers the following classes: yard helpers, yard foremen, passenger and freight brakemen and flagmen, and switch tenders (R. 74a, Par. 8(a)).

craft and class of conductors, and the B & O acquiesced in such demand (R. 75a; App. 4a, 5a).

Seeking to protect his employment and seniority rights *as a conductor only*, the respondent Smith, on behalf of himself and others similarly situated, brought this action for injunctive relief against the B & O (R. 7a-24a). The BRT, petitioner herein, intervened as a party defendant (R. 1a, 6a).

The District Court held that the BRT union shop contract did not require interpretation inasmuch as there was no dispute between the parties thereto as to its interpretation or application (App. 6a). It further held that as so applied by the parties the contract was invalid and in violation of the Railway Labor Act insofar as it was applied to deprive Smith and others similarly situated of their employment and seniority rights *as conductors*, and granted the injunction as prayed against both the petitioner and the respondent B & O (App. 7a). No appeal was taken by the B & O (App. 11a). The petitioner alone appealed to the Court of Appeals (R. 111a), which court affirmed the judgment below (App. 8a-17a). The issue in the case at bar did not involve the interpretation of the contract, but rather the question of whether the contract, as construed and acted upon by the parties thereto, violated the restrictions of the union shop provisions of the Railway Labor Act.

REASONS FOR DENYING THE WRIT

I

The Courts Have Jurisdiction of Suits That Involve the Validity of Contracts Under the Railway Labor Act.

Based upon the evidence in this cause, the greater portion of which was stipulated by the parties, the courts below properly held that the dispute involved the validi-

ty of the union shop agreement as construed and acted upon by the parties thereto and was a case of which the court had jurisdiction. *Brotherhood of Railroad Trainmen vs. Howard*, 343 U. S. 768; *Steele vs. Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall vs. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; *Mount vs. Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604 (C. A. 6) certiorari denied 350 U. S. 967; *Williams vs. Central of Georgia Ry. Co.*, 124 F. Supp. 164. (M. D. Ga.)

Brotherhood of Railroad Trainmen vs. Howard, 343 U. S. 768, involved a collective bargaining agreement which was "construed and acted upon" by the parties thereto as prohibiting Negro porters from performing any of the duties of brakemen (343 U. S. at 772). This court held that the agreement was "to this extent illegal and unenforceable", stating at 343 U. S. 768, 774:

> "This dispute involves the validity of the contract, not its meaning."

Moreover, the BRT union shop agreement (R. 15a-24a) required no interpretation. By its terms it is limited to the classes and crafts represented by the BRT (R. 22a). It does not purport to affect conductors. The B & O and the BRT cannot, by enforcing an unambiguous contract in an illegal manner and contrary to its plain language, create a question of meaning where none exists and thereby deprive the courts of jurisdiction to grant relief against action that is illegal under the Railway Labor Act. See *W. P. Brown & Sons Lumber Co. vs. Louisville & Nashville R. Co.*, 299 U. S. 393, at 397-8. If the BRT union shop agreement purported to apply to conductors, it would be clearly invalid in this respect under the Railway Labor Act, and particularly Section

2, Ninth, and Section 2, Eleventh, (a),[4] and the courts would have the duty to enjoin its invalid operation. *Brotherhood of Railroad Trainmen vs. Howard*, 343 U. S. 768. *Virginian Ry. Co. vs. System Federation No. 40*, 300 U. S. 515, 548, 549. The contracting parties cannot by indirection accomplish a result for which they could not have legally provided by the terms of the agreement.

The District Court clearly had jurisdiction of this suit. The numerous cases stemming from the decision in *Slocum vs. Delaware, Lackawanna & Western R. Co.*, 339 U. S. 239, cited by the petitioner (Petition, pp. 7-8) have no application to the facts in the instant case, as was pointed out in the decision of the Court of Appeals (App. 12a-13a).

The petitioner erroneously argues that the decision of the Court of Appeals in this action is in conflict with the holding of this court in *Pennsylvania R. Co. vs. Rychlik*, 352 U. S. 480. The *Rychlik* case involved employees who were members of a craft represented by a union having a union shop agreement. They joined another union, United Railroad Operating Crafts (UROC) which was competing for the craft with the contracting union, and were charged with violation of the union shop agreement. This court, interpreting Section 2, Eleventh, (c), of the Railway Labor Act,[5] held that the alternative union membership allowed by such subsection is only in those unions which had qualified under Section 3, First, of the Act.[6] *No issue of this kind is presented in this case.* The respondent ORC is a railway labor organization national in scope and qualified under Section 3,

[4] 45 U. S. C., Sec. 151, *et seq*; 45 U. S. C., Sec. 152, Ninth; 45 U. S. C., Sec. 152, Eleventh, (a).

[5] 45 U. S. C., Sec. 152, Eleventh, (c).

[6] 45 U. S. C., Sec. 153, First.

First, of the Railway Labor Act. The issue in this case, unlike that in the *Rychlik* case, does not involve the claim that an alternative union membership prevented the discharge of the individual respondents as trainmen. The fundamental issue is the validity of the BRT union shop agreement covering trainmen to effect the discharge of respondents *as conductors* and the destruction of the employment and seniority rights acquired by them *as members of the craft of conductors.*

The District Court and the Court of Appeals upheld the validity of the union shop contract insofar as it applied to the job status and seniority of the trainmen, but held it invalid insofar as it was enforced against conductors holding employment rights in the craft of conductors under the exclusive jurisdiction of the ORC. As the Court of Appeals stated in its decision:

> "* * * much of BRT's argument is eliminated by the fact that the relief is prayed for *only* as to the rights of Smith and others *as conductors* and the court specifically limited the relief granted to such rights." (App. 14a) (emphasis supplied)

II

There Is No Issue In This Cause As To Whether After-Acquired Membership In Another Organization National In Scope Will Excuse A Prior Failure To Comply With A Union Shop Agreement.

The issue of after-acquired membership in a qualified labor organization is not involved in the case at bar. It was never urged in the courts below, nor did such courts rely on or consider such an issue. No claim was made by the respondents that the subsequent membership, if any, of the individual respondents in the ORC prevented their discharge *as trainmen* for their alleged failure to comply with the petitioner's union shop agreement.

The sole claim was that the Railway Labor Act did not authorise the BRT and the railroad to enter into a union shop agreement covering trainmen which deprived conductors of their employment and seniority rights.

Section 2, Eleventh, (a), is the portion of the 1951 amendment to the Railway Labor Act which allowed the union shop in the railroad industry, subject to the restrictions therein contained. One of the basic tenets of the Railway Labor Act has been and is that the various crafts and classes shall be exclusively represented by labor organizations which represent a majority of the members of such craft or class. The ORC is the certified representative of road conductors employed by the B & O. As the Court of Appeals correctly stated:

> "In the light of the whole Act, we think the phrase 'continued employment' means continued employment in the craft or class covered by the BRT contract, that is, in the trainmen, and that the phrase has no reference to employment in a totally different craft or class such as that of the conductors * * *." (App. 16a)

The ORC is the exclusive bargaining representative for the class and craft of conductors and has the obligation and duty of representing all employees belonging to such class and craft, whether members of the organization or not. The BRT has no right to encroach, trespass and infringe upon the employment and seniority rights of respondents as conductors and as members of the class and craft of conductors. The courts below enjoined the attempt as illegal and invalid under the Railway Labor Act.

CONCLUSION

Upon the record in this cause we submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES A. HASTINGS
V. C. SHUTTLEWORTH
HARRY E. WILMARTH
1120 Merchants National Bank Bldg.
Cedar Rapids, Iowa

JOSEPH A. SEGAL
DAVID W. GOLDMAN
1616 Union Central Bldg.
Cincinnati 2, Ohio

Counsel for Respondents,
Charles V. Smith and Order of Railway Conductors and Brakemen, General Committee of Adjustment for The Baltimore and Ohio Railroad.

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IN THE
Supreme Court of the United States
October Term, 1957

No. 655

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner*,

v.

CHARLES V. SMITH, and OTHERS OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD and THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation, *Respondents*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

GERHARD VAN ARKEL
HENRY KAISER
Van Arkel & Kaiser
1701 K Street, N. W.
Washington 6, D. C.

J. A. CULBERTSON
905 First National Bank Bldg.
Cincinnati 2, Ohio
Counsel for Petitioner.

WAYLAND K. SULLIVAN
Assistant General Counsel
Brotherhood of Railroad Trainmen.
Cleveland 13, Ohio

Counsel for Petitioner
Brotherhood of Railroad Trainmen

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 835

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner,*

v.

CHARLES V. SMITH, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD and THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation, *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

On April 28, 1958, the Court denied the petition for certiorari herein (not yet reported; see 26 Law Week 3310).

On the same day, the United States Court of Appeals for the Seventh Circuit rendered its opinion in *McNamar* v. *Baltimore and Ohio Chicago Terminal Railroad Co., et al.,* F. 2d (not yet reported; printed as Appendix A hereto). That decision conflicts with the opinion of the Sixth Court of Appeals in this case, as hereinafter shown, and is an intervening circumstance of substantial effect within the meaning of Rule 58.

The facts in *McNamar* are closely similar to those here. In both cases, the plaintiffs were members of, and subject to a Union Shop Agreement held by, the Brotherhood of Railroad Trainmen. McNamar, on March 1, 1952, and the plaintiff herein, on July 1, 1952, voluntarily relinquished their membership in the BRT. McNamar, in July, 1953, joined the Switchmen's Union of North America, an organization admittedly national in scope, as the plaintiff herein joined the Order of Railway Conductors on April 1, 1956 (Petition for certiorari, p. 5). Both were cited for this violation of the union shop agreement. McNamar was discharged on October 22, 1954, and brought suit in the United States District Court for Northern Indiana for damages for wrongful discharge. That Court granted summary judgment for the defendants (including the Brotherhood of Railroad Trainmen), *McNamar* v. *Baltimore and Ohio Chicago Terminal Railroad Company,* 135 F. Supp. 835, which action the Court of Appeals affirmed.

To reach this result, the Seventh Court of Appeals explicitly, or by necessary implication, was required to decide four issues in a manner contrary to the holding of the Sixth Court of Appeals in this case. First it concluded, unlike the Court in this case, that McNamar's voluntary relinquishment of membership in the BRT constituted adequate grounds for discharge. It said (App. p. 2a),

> . . . it is clear this plaintiff was not a member of any qualified labor organization during the sixty day period after he quit the defendant Brotherhood . . . McNamar breached the Union Agreement and the Railroad discharged him upon demand of its co-defendant [the BRT].

Second, the Seventh Court of Appeals expressly rejected the plaintiff's reliance on *Steele* v. *Louisville and Nashville Railroad Co.*, 323 U. S. 192 (dealing with racial discrimination) stating that this "is much too narrow a holding for the plaintiff" (App. p. 3a). The Sixth Court of Appeals in this case rested its opinion on Steele (Petition for certiorari, p. 14a), as the ground for holding that the District Court had jurisdiction.

Third, by necessary implication, the Seventh Court of Appeals in *McNamar* held that the plaintiff's belated acquisition of membership in the Switchmen's Union did not cure his prior default. McNamar joined that organization over a year before his discharge. In holding that he had no cause of action, the Court necessarily concluded that such after-acquired membership was insufficient to deprive the defendant railroad and labor organization of the right to procure his discharge because of his breach of the agreement. In this case, the Court of Appeals held that Smith's after-acquired membership in the ORC was sufficient to protect him from discharge. (Petition for certiorari, pp. 15a, 16a).

Fourth, the Seventh Court of Appeals held that McNamar's belated acquisition of membership in the Switchmen's Union did not constitute "changing membership from one organization to another organization" within the meaning of Section Eleventh (c) of the Railway Labor Act (Petition for certiorari, p. 23a). That Court pointed out that "this plaintiff was not a member of any qualified labor organization during the sixty day period after he quit the defendant Brotherhood" (App. p. 2a), and correctly considered that this made him vulnerable to the penalty

provided for a breach of the agreement. In this case, the Court of Appeals relied on the after-acquired membership in the ORC to excuse the admitted default (Petition for certiorari, p. 15a, 16a).

Because McNamar sued for damages, rather than for an injunction as in this case, the Seventh Court of Appeals felt that *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630 (1941) was controlling, so as to give the District Court jurisdiction (App. p. 3a). It made it clear, however, that it adhered to its ruling in *United Railroad Operating Crafts et al.* v. *Pennsylvania Railroad et al.*, 212 F. 2d 938 (1954), holding that where, as here, injunctive relief is sought, exclusive primary jurisdiction is vested in the National Railroad Adjustment Board. (Id.) In this case, the Sixth Court of Appeals held that that doctrine did not apply. (Petition for certiorari, pp. 7, 14a).

The decision of the Seventh Court of Appeals in *McNamar* demonstrates the conflict among the Court of Appeals on these issues. Additionally, it serves to emphasize the importance of these questions in the administration of the Railway Labor Act, and in the administration of agreements entered into pursuant to that Act, discussed at pp. 13-14 of our petition for certiorari. The decision of the Seventh Court of Appeals in *McNamar* would have required a holding in this case a) that the National Railroad Adjustment Board had exclusive primary jurisdiction of the matter and b) that the parties had adequate grounds for disciplining plaintiffs. The operations of the carriers, and of the labor organizations representing their employees, are carried on within both these judicial circuits. It cannot be anticipated that one set of rules will govern, rather than another, because of the hap-

penstance that a plaintiff brings his action in a District Court within one, rather than another, Circuit. The results must be gross inequities as between employees, and grave uncertainties in the administration of such agreements, until this Court resolves the conflict. The large number of cases now pending (Petition for certiorari, p. 12 fn. 7) make it desirable that this be done as promptly as possible.

In order to terminate the confusion and uncertainty which will necessarily result from allowing these conflicting decisions to stand, we urge that the Court reconsider its denial of the petition herein, and grant review.

Respectfully submitted,

GERHARD VAN ARKEL
HENRY KAISER
Van Arkel & Kaiser
1701 K Street, N. W.
Washington 6, D. C.

J. A. CULBERTSON
905 First National Bank Bldg.
Cincinnati 2, Ohio

Counsel for Petitioner.

WAYLAND K. SULLIVAN
Assistant General Counsel
Brotherhood of Railroad Trainmen.
Cleveland 13, Ohio

Counsel for Petitioner
Brotherhood of Railroad Trainmen

Certificate

I, Gerhard Van Arkel, one of counsel for the petitioners in this cause, certify that the foregoing Petition for Rehearing is filed in good faith and not for purposes of delay and that the Petition is restricted to an intervening circumstance of substantial effect: the decision of the Seventh Court of Appeals of April 28, 1958 in *McNamar* v. *Baltimore and Ohio Chicago Terminal Railroad Co.*, F.2d. .

.....

GERHARD VAN ARKEL

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12135 SEPTEMBER TERM 1957, JANUARY SESSION, 1958

WILLIAM P. McNAMAR,
Plaintiff-Appellant,
v.
BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD COMPANY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

---

April 28, 1958

Before FINNEGAN, SCHNACKENBERG and PARKINSON, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* McNamar, plaintiff railroad switchman, sued his former railroad employer, Baltimore & Ohio Chicago Terminal Railroad Company and, the statutory bargaining representative, Brotherhood of Railway Trainmen, in the Lake Superior Court, Indiana, to recover damages for plaintiff's dismissal from railroad service for failure to comply with the union shop agreement concerning members of plaintiff's craft. After the cause was removed to the United States District Court, a motion for summary judgment was allowed on the facts based upon the reasons and grounds reported in *McNamar v. Baltimore & Ohio Chicago Terminal R. Co.*, 153 F. Supp. 835 (D.C. Ind. 1957); this appeal followed.

Plaintiff insists his is an Indiana common law tort action "for a third party conspiring with a party to

a contract, to cause its breach." Obviously an existing contract is indispensable for the foundation of plaintiff's action for procuring its breach and if McNamar violated the Union Shop Agreement he cut ground from under himself. On the other hand if, somehow, a contract was extant between plaintiff and his employer, these defendants were justified in taking the action now complained of. See *e.g. Bohnen* v. *Baltimore & Ohio Chicago Terminal R. Co.*, 125 F. Supp. 463 (D.C. Ind. 1954) where McNamar was also a plaintiff in an action about which the district judge explained, *inter alia:*

> "The gravamen of the plaintiffs' complaint in the instant case is that the Brotherhood of Railroad Trainmen refused reinstatement only to those members of UROC who were active in that organization and that the Brotherhood offered and did accept back those members of UROC who were not active in that organization. Plaintiffs say this constitutes discrimination and that their discharge by the employer is a violation of Section 2, Eleventh (a) of the Railway Labor Act, 45 U.S.C.A. § 152, since the cause of their non-membership in the Brotherhood of Railroad Trainmen is not the failure to pay dues but rather, is a policy of the Brotherhood not to reinstate them because of their previous activities in the rival union; that their discharge is the result of hostile discrimination by the bargaining representative and that therefore the district court has initial jurisdiction to issue an injunction under the principle of *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 65 St. Ct. 226, 89 L. Ed. 173".

From what that same district judge concluded in the current situation about McNamar it is clear this plaintiff was not a member of any qualified labor organization during the sixty day period after he quit the defendant Brotherhood and fact finding at a trial simply would not bridge that hiatus. McNamar breached the Union Agreement and the Railroad discharged him upon demand of its co-defendant. Rule 56, Federal Rules of Civil Pro-

cedure, 28 U.S.C. having been repeatedly discussed in our opinions, needs no further exposition in this case. See *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480 (1957).

Moore v. *Illinois Central R. Co.*, 312 U.S. 630 (1941) was decided before the decision in *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480 (1957) and McNamar seeks money damages rather than reinstatement or prevention of discharge from employment. Our opinion in *United Railroad Operating Co.* v. *Pennsylvania R. Co.*, 212 F. 2d 938 (7th Cir. 1954) is distinguishable on the jurisdictional problem because it was to restrain the defendant Railroad from discharging plaintiffs. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944) is much too narrow a holding for this plaintiff. In this case, and only on these facts, we will assume plaintiff did not have to exhaust his administrative remedies available at the System Board level before resorting to his purported action for damages. The motion for summary judgment was correctly allowed and that is the narrow ground of our disposition.

Judgment affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.